

BOARD MEETING)
July 21, 2006)
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Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
July 21, 2006
9:10 a.m.

PREPARED BY: LAURIE CRUTCHER, RPR
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1 Whereupon, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 (Mr. Russell and Ms. Kaiser not present)

5 CHAIRMAN RUSSELL: I'll call this
6 meeting to order. We're waiting on two Board
7 members to become present. Kim Lacey is on the
8 phone. And Bill actually got out of Missoula a
9 little late.

10 And we're going to change the order of
11 the agenda up just a little bit. When we get to
12 those sections, if for some reason we need to not
13 take that out of order because of someone that
14 would be here, we'll rearrange that as necessary.
15 We're going to actually go through the briefing
16 items, and we'll also do the action items in
17 Section II, and then briefing items by Katherine,
18 then we'll hold the other briefing items on metal
19 mines and mercury until Bill and Heidi are
20 present.

21 So with that, I'll start into the
22 contested case updates. Katherine.

23 (Ms. Kaiser present)

24 MS. ORR: Good morning. The Board
25 members have a synopsis of these cases in Item

1 I.A.1, and there are some brief updates, of
2 course, since the agenda was put together, and let
3 me go through that.

4 Everything remains the same on the first
5 page. There is no changes, except on the Gasvoda
6 case that a hearing is set for September 13th.

7 In the next item involving Blahnik
8 Construction, it looks like the parties are going
9 to -- there will be a motion to dismiss because
10 the Appellant has -- or the Complainant has filed
11 an intention to withdraw the appeal.

12 In Item G, Big Sky Ready Mix, a motion
13 for summary judgment was filed on July 10th. And
14 you'll see in the next items, we have some
15 hearings set.

16 In Item J, the parties have signed an
17 administrative order on consent. That's the
18 Thomas M. Thomas Pointe of View Ranch. But I
19 haven't received that yet, so we'll probably be
20 submitting that to the Board for approval, the
21 dismissal, at the next meeting.

22 And in Item K, the Roundup Power
23 Project, the parties have requested that a hearing
24 be held some time this coming January, which I
25 will be setting.

1 So that's all of those items. I'd be
2 glad to go on to the final action on appeals, if
3 that's what you would like.

4 CHAIRMAN RUSSELL: That's what we'd
5 like.

6 MS. ORR: Okay. Scanlan Construction is
7 a matter in which the parties have signed an
8 administrative order on consent, and you all have
9 a draft copy of the order of dismissal. This was
10 a case involving a Department issuance of a notice
11 of violation for failure to submit an annual
12 progress report, and the penalty payment on that
13 was \$400, and Scanlan Construction has agreed to
14 file all of the back progress reports. So we need
15 your vote on that order of dismissal.

16 CHAIRMAN RUSSELL: I need a motion to
17 authorize the Chair to sign the orders dismissing
18 this with prejudice.

19 MR. MARBLE: So moved.

20 CHAIRMAN RUSSELL: It's been moved by
21 Don. Is there a second?

22 MS. LACEY: I'll second it. Kim Lacey.

23 CHAIRMAN RUSSELL: It's been seconded by
24 Kim. All those in favor, signify by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: Thank you.

4 MS. ORR: The next one is a matter
5 involving a challenge by a neighbor to the
6 issuance of a permit to Paveco Gravel Pit, and
7 that person withdrew her challenge to the issuance
8 of that permit, and the Department moved to
9 dismiss that case, and the order of dismissal is
10 before the Board as well.

11 CHAIRMAN RUSSELL: I probably have that,
12 but I don't see it in front of me, that order.

13 MS. ORR: I just gave it to you, Joe.

14 CHAIRMAN RUSSELL: Since we're in order
15 and out of order, I'm way out of order. All
16 right. I have it. I'm going to ask a question
17 after we do this, so we won't move on. But I do
18 have an order of dismissal to dismiss this case
19 with prejudice. Do I have a motion for the Board
20 Chair to sign?

21 MS. KAISER: So moved.

22 CHAIRMAN RUSSELL: It's been moved by
23 Heidi. Is there a second?

24 MR. MARBLE: Second.

25 CHAIRMAN RUSSELL: It's been seconded by

1 Don. All those in favor, signify by saying aye.

2 (Response).

3 CHAIRMAN RUSSELL: Opposed.

4 (No response).

5 CHAIRMAN RUSSELL: Since this is settled
6 now, why did she drop this?

7 MS. ORR: Because her complaint really
8 boils down to a challenge to the way that the
9 Environmental Assessment was done, and I think she
10 determined correctly that the Board doesn't have
11 jurisdiction over those kinds of challenges. And
12 maybe Jane Amdahl from the Department could
13 address that.

14 MS. AMDAHL: There have been a lot of
15 challenges lately to various things that the open
16 cut mining cut program has done.

17 This particular case, I actually spoke
18 to Mrs. Christianson, and she told me primarily
19 that it was her impression that all she was doing
20 was asking to come before the Board and speak.
21 She didn't realize there was a whole -- basically
22 a litigation process involved, with discovery, a
23 Hearing Examiner, and so on, and she was not
24 interested in pursuing something along that
25 nature. And also I had pointed out to her about

1 what Katherine was talking about.

2 CHAIRMAN RUSSELL: She's a frequent
3 visitor to my office.

4 We need to wait on Flying J because
5 we're going to actually get an attorney from
6 Denver on the phone. So let's go. We'll hold off
7 on Flying J.

8 MS. ORR: The next item -- We had a
9 hearing on May 23 in Missoula involving Bear Cub,
10 LLC, which is trying to get approval to create
11 Sunrise Lot Subdivision off of Reserve Street.
12 And the findings of fact and conclusions of law
13 are in your packet, and the attorney for Bear Cub
14 has decided not to file exceptions; and therefore
15 what is before the Board today is to approve my
16 proposed order concerning Sunrise Lots.

17 This is a case where it's a small,
18 relatively small subdivision that was proposed to
19 be put in, and Sunrise Lots or Bear Cub was asking
20 for a waiver from the requirement that they hook
21 up to the public water supply, and they wanted to
22 put an individual well in that would serve the
23 subdivision owners.

24 And the overwhelming evidence indicates
25 that that wouldn't be protective of public health

1 because there wouldn't be any continuous
2 monitoring, for example, that the aquifer in
3 Missoula is very contaminated from different
4 sources. And it just wouldn't be a good thing.

5 Another interesting issue in this case
6 is what they were calling the domino effect, that
7 if Sunrise Lots were not required to hook up to
8 the public water supply, then the individuals
9 north and around the subdivision wouldn't be
10 required either, because the requirement is a 500
11 feet requirement. And so that would create a
12 domino effect. Those other subdivisions, in going
13 around, would not be required to hook up to public
14 water supply.

15 So Bear Cub is not challenging our
16 findings of fact, so that should make it little
17 easier for the Board.

18 CHAIRMAN RUSSELL: I have an order.
19 Interesting. It sounds like this order authorizes
20 the Board Chair to affirm the waiver, the
21 Department's waiver.

22 MS. ORR: Right.

23 CHAIRMAN RUSSELL: So I need an order
24 for the Chair to sign an order affirming the
25 Department's denial of the waiver. Do I have a

1 motion?

2 MS. SHROPSHIRE: So moved.

3 CHAIRMAN RUSSELL: It's been moved by
4 Robin. Is there a second?

5 MS. KAISER: Second.

6 CHAIRMAN RUSSELL: It's been seconded by
7 Heidi. All those in favor, signify by saying aye.
8 (Response).

9 CHAIRMAN RUSSELL: Opposed.

10 (No response).

11 CHAIRMAN RUSSELL: Thank you.

12 MS. ORR: Then we have the new contested
13 case appeals. And what's been written here, of
14 course, speaks for itself.

15 In Item No. 2, a motion to dismiss was
16 filed on July 18th, and we're waiting for a
17 response to that. And other than that, there
18 hasn't been another step that's occurred over and
19 above what's on the agenda, but I do need your
20 authorization to have me go forward with those as
21 Hearing Examiner.

22 CHAIRMAN RUSSELL: Do I have a motion to
23 appoint Katherine permanent Hearing Examiner?

24 MS. KAISER: So moved.

25 CHAIRMAN RUSSELL: Is there a second?

1 MR. SKUNKCAP: Second.

2 MS. SHROPSHIRE: Are these for all of
3 these new ones? Are we doing all of them?

4 CHAIRMAN RUSSELL: We can do them all if
5 you want.

6 MS. SHROPSHIRE: It doesn't matter.

7 CHAIRMAN RUSSELL: I don't see us
8 handling any of them. Do you want to amend your
9 motion to include all three, appoint Katherine the
10 Hearing Examiner in all the new contested cases?

11 MS. KAISER: So amended and so moved.

12 CHAIRMAN RUSSELL: It's a friendly
13 amendment. All four?

14 MS. KAISER: All four.

15 CHAIRMAN RUSSELL: Is there a second to
16 that friendly amendment?

17 MS. SHROPSHIRE: Second.

18 CHAIRMAN RUSSELL: It's been seconded by
19 Robin. All those in favor, signify by saying aye.

20 (Response).

21 CHAIRMAN RUSSELL: Opposed.

22 (No response).

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1 CHAIRMAN RUSSELL: We're going to go
2 back to the Action Item 2.A.

3 MS. WITTENBERG: Kim, I'm going to put
4 you on hold for a minute.

5 MS. LACEY: Okay.

6 CHAIRMAN RUSSELL: We're doing Flying J.

7 MS. WITTENBERG: Can you hear us okay?
8 I'm going to try to connect Kim Lacey, so hold on
9 real quick.

10 (Mr. John Fognani present
11 by telephone)

12 CHAIRMAN RUSSELL: John, this is Joe
13 Russell. I'm the Chair of the BER, and I'm going
14 to turn this over to Katherine at this time,
15 Katherine Orr.

16 MR. FOGNANI: May I ask if you can hear
17 me okay?

18 CHAIRMAN RUSSELL: We can hear you fine.
19 You may have trouble picking us up because we only
20 have two remote mikes. So if you can't hear us,
21 please tell us that.

22 MR. FOGNANI: Okay. I appreciate that.
23 Thank you.

24 MS. ORR: John, good morning. This is
25 Katherine Orr.

1 MR. FOGNANI: Good morning, Ms. Orr.

2 MS. ORR: We are at the stage where the
3 Board is faced with the decision of whether or not
4 to agree with the conclusions of law that I issued
5 in the order on the partial motion for summary
6 judgment, as you know. And you have had an
7 opportunity to file written exceptions, the
8 Department has filed an answer, and you filed a
9 reply, all of which the Board has reviewed. And
10 you have an opportunity to present argument in
11 effect on your exceptions, and then Mr. Christie
12 is here, and he will provide argument, and then
13 I'll be available to answer any questions for the
14 Board.

15 MR. FOGNANI: I understand.

16 MS. ORR: With that, why don't you go
17 ahead and proceed.

18 MR. FOGNANI: Thank you. Good morning,
19 Board members. For the record, I'm John Fognani.
20 I'm appearing on behalf of Flying J through this
21 telephonic conference call. I'm sorry I'm not
22 able to be there with you today, and I hope that
23 will not in any respect disadvantage Flying J in
24 this proceeding, and I'm assuming obviously that
25 it will not. But I do appreciate you extending

1 the opportunity to enable me to make this argument
2 by telephonic hook up.

3 At the outset, before I get into the
4 substantive issues with regard to what we have
5 briefed, which I think are fairly straight
6 forward, and I think we have probably fairly
7 comprehensively briefed the issue, what I would
8 say at the outset is that on Flying J's behalf, we
9 will request that the determination by the Board
10 with regard to this motion for partial summary
11 judgment be held in abeyance until it becomes
12 clear that in fact both parties are going to seek
13 access to the Board for the determination of this
14 through a hearing.

15 So I would request as a procedural
16 matter that you await a determination on the
17 motion for summary judgment until it becomes clear
18 that this matter is in fact going to proceed to a
19 hearing, because otherwise it doesn't make any
20 particular difference in the context of this
21 administrative matter, whereas otherwise if there
22 is a determination made, and one side or the other
23 does not prevail, then it would probably be
24 incumbent as a matter of precedent for the side
25 that is not successful to appeal, and I certainly

1 think that would be true in Flying J's situation.

2 So at the outset, I would suggest that
3 this determination can await a further
4 determination of whether or not there is going to
5 be a formal hearing before the Board, and so I
6 would make that request and suggestion as a
7 procedural matter. And I think it would be
8 frankly counter-productive for the Board to make
9 the final decision on the proposed order at this
10 time unless this matter does in fact go forward to
11 a hearing.

12 With that said, as I mentioned earlier,
13 I believe Flying J has fairly comprehensively
14 briefed this issue. I'll come at this from the
15 standpoint of a couple of fundamental points, and
16 then I would like to elaborate on those points.

17 First of all, if the Board determines
18 that it's necessary to make a final decision on
19 the Hearing Officer's proposed order, Ms. Orr's
20 order today, we would request respectfully that
21 the Board disapprove the order for the reasons
22 obviously we've identified in our briefing papers,
23 and as well based on the argument I'm going to
24 make today.

25 As you know from our papers and the

1 appeal that we filed some time ago with the Board,
2 Flying J's petition requested a contested case
3 hearing to review the Department's decision to
4 issue the final permit; and in the context of
5 requesting that contested case hearing, of course,
6 we cited to 40 CFR 124.19(a) as the source of the
7 Board's authority to take that action. That's a
8 federal regulation that has in fact been
9 incorporated by reference into the Montana
10 Hazardous Waste Management Program, and of course,
11 I defer to your knowledge on that, because you
12 know that obviously better than I.

13 But the proposed order that Ms. Orr has
14 provided to the Board turns on an erroneous
15 determination that that Section, Section
16 124.19(a), does not for some reason give the Board
17 authority to review the Department's decision to
18 issue the final permit, and the erroneous
19 determination rests on two erroneous conclusions.

20 First of all, the proposed order
21 mistakenly concludes that Section 124.19 allows
22 for review only of permit conditions, not the
23 decision to issue a permit itself. And I suggest
24 when you look at the language of 124.115, there is
25 absolutely no way anyone can come to that

1 conclusion.

2 Secondly, the proposed order mistakenly
3 concludes that the regulation does not apply to
4 the Board, this Board, in any event, because State
5 law does not expressly substitute "Board of
6 Environmental Review" for "Environmental Appeals
7 Board," end quote. And frankly, I can't believe
8 the Department would ever make such a
9 determination, because effectively what the
10 Department is arguing is that an error in drafting
11 should be held against Flying J as a member of the
12 regulated community, and I don't think that could
13 possibly be anyone's intention, and certainly not
14 this Board's intention.

15 In any event, the mistaken conclusion
16 that Section 124.19 applies only to review of
17 permit conditions apparently originates from the
18 proposed order's inaccurate description of the
19 rule itself, and I quote: "Under 40 CFR 124.19, a
20 person may request review by the Environmental
21 Appeals Board of a permit condition imposed by the
22 Department," end quote. That's contained in the
23 proposed order at Page 1.

24 Applying this inaccurate description of
25 the rule, unfortunately, the question of the

1 Department's decision to issue the final permit,
2 the proposed order proceeds to dismiss Flying J's
3 claim because the order says, quote, "Flying J is
4 not challenging a condition of the permit," end
5 quote. And that's contained in the order at Page
6 6.

7 Contrary to the proposed order's flawed
8 reasoning, the decision to issue a permit is well
9 within the scope of review that's authorized by 40
10 CFR Section 124.19, and I would cite you to that
11 portion of the regulation that states in pertinent
12 part as follows: "Within 30 days after RCRA final
13 permit decision has been issued under Section
14 124.15 of this part, any person who filed comments
15 on the draft permit may petition the Environmental
16 Appeals Board to review any condition of the
17 permit decision." And it says, "review any
18 condition of the permit decision."

19 Under 40 CFR 125.15 -- which I'm sure
20 you properly have in front of you, or may know
21 quite well, just as a matter of your Board
22 function -- a final permit decision is
23 specifically defined, at least in part, as a final
24 decision to issue a permit. It goes on to say
25 that it's a final decision to issue, deny, modify,

1 revoke, and reissue or terminate a permit.

2 Inserting that portion of the definition
3 directly into Section 124.19, which I think you
4 plainly must in order for those two sections to be
5 read in concert, the rule plainly authorizes the
6 Board to review the Department's decision to issue
7 the final permit, which is what we're here today
8 to discuss.

9 In its answer to Flying J's exception,
10 the Department, through I think a fairly torturous
11 and flawed interpretation of the rules, attempts
12 to convince this Board, and attempts to claim that
13 a final permit decision under Section 124.19 is
14 not the same as, quote, "final permit decision,"
15 end quote, under Section 124.15, even though
16 Section 124.19 specifically refers to a final
17 permit decision under 124.15. And this assertion
18 can't under any reasonable analysis, in my
19 opinion, be sustained.

20 Section 124.19 refers to a, quote,
21 "Final permit decision," and the definition of
22 "final permit decision" is contained in Section
23 124.15, and that definition obviously includes a
24 decision to issue a permit by the express language
25 used in the section.

1 Obviously we've again comprehensively
2 briefed this issue, and provided that briefing and
3 those papers to the Board.

4 The second erroneous conclusion, as I
5 mentioned earlier -- that purportedly supports the
6 proposed order's determination that the Board has
7 no authority under Section 124.19 to review the
8 decision to issue the final permit -- is, I
9 suggest to you, even more strained, and frankly in
10 all due respect, preposterous.

11 What is said there is that the Board is
12 not authorized to review the decision under
13 124.19, because there is no substitution of a
14 state term for the reference to "Environmental
15 Appeals Board" in the Montana regulations. And
16 therefore, the order goes on to state that the
17 State presumably decided that the procedure in
18 124.19 would not apply.

19 I suggest to you, and as we've
20 identified in our briefing papers, that argument
21 is mistaken for a number of reasons. First of
22 all, the argument is so patently absurd that I
23 cannot imagine, again in all due respect, that
24 anyone at the State would attempt to make the
25 argument, because it effectively holds Flying J

1 responsible for a drafting error that may have
2 occurred in changing the term of "Environmental
3 Appeals Board" to the "Board of Environmental
4 Review."

5 But first of all, the conclusion is
6 contrary to the Department's own interpretation of
7 the rule. When the Department transmitted the
8 final permit to Flying J in a letter from Rebecca
9 Holmes that was dated October 29, 2003, Ms. Holmes
10 specifically stated the following, and I quote
11 from the letter: "Any person who filed comments
12 on the draft permit may petition the Board of
13 Environmental Review to review any condition of
14 the final permit decision under 40 CFR 124.19 as
15 incorporated by reference," in the State
16 counterpart to that particular rule which is
17 17.53.1201.

18 This interpretation by the Department is
19 compelling, because as a general matter, an
20 agency's interpretation of its own rules is
21 afforded some weight.

22 The second point with regard to the
23 second erroneous conclusion is that it's
24 inescapable that 124.19 was duly adopted and
25 incorporated by reference into the Montana

1 hazardous waste management requirements. For that
2 reason, Flying J submits that it's a valid finding
3 and enforceable state regulation. If the
4 Department had not intended for that particular
5 regulation to be part of the hazardous waste
6 program, as you know full well, it would have
7 excluded the rule under ARM 17.53.1202, which
8 contains a specific section-by-section list of
9 federal regulations that were not incorporated
10 into the state program, and that was not done with
11 this section.

12 Third, if the proposed order is correct,
13 and Section 124.19 does not apply to the Board
14 simply because there is no express substitution of
15 the term "Board of Environmental Review" for
16 "Environmental Appeals Board," then the entire
17 regulation frankly is meaningless, it applies to
18 nothing, and has no application whatsoever to the
19 State's hazardous waste program, despite being a
20 valid part of the program. And I think that's
21 contrary to the goal of statutory and regulatory
22 interpretation, as noted in a couple of cases that
23 have been decided by the Montana Supreme Court,
24 and we've identified those cases for your benefit.

25 So to give effect to the purpose of

1 Section 124.19, and viewing the rule in the
2 context of the State's hazardous waste program,
3 which is intended, we believe, to be equivalent to
4 the federal hazardous waste program, a proper
5 interpretation of the rule gives references to the
6 Environmental Appeals Board, their obvious
7 meaning, as references to the Board of
8 Environmental Review. And obviously Flying J
9 can't be penalized for effectively what might
10 amount to an error in drafting of the Montana
11 rules.

12 I believe we can all recognize that it's
13 a fundamental tenet of administrative law that
14 Environmental Appeals Boards are constituted
15 specifically to review agency action, and to
16 review the exercise of agency discretion. That's
17 their fundamental purpose, and that purpose is
18 related to a check and balance that should occur
19 in administrative law.

20 To take the approach that the Department
21 has taken in the context of this motion for
22 summary judgment would be to deny Flying J access
23 to the Board in the first instance with regard to
24 the question of issuance of the permit over some
25 other alternative, and would also deny the Board

1 the opportunity to review that determination by
2 the Department.

3 This appeals board was constituted
4 precisely for the purpose that we've sought
5 access, which is to review not just permit
6 conditions, but to review the fundamental
7 determination with regard to the issuance of a
8 permit over any alternative formal administrative
9 mechanism that could have been utilized. I submit
10 to you that Section 124.15 specifically references
11 the issuance of the permit as an opportunity for
12 Board review. And frankly, Flying J has a legal
13 right to seek Board review with regard to that
14 important determination.

15 The Department, with its argument in
16 this motion for summary judgment, has effectively
17 made a narrow, I submit, form over substance
18 argument to deny the Board its ability to review
19 Department actions that we believe virtually in
20 any other state is reviewable by a similar board;
21 and similarly, it goes to deny Flying J access to
22 the Board to review the Department's actions on
23 what I would consider to be a hypertechnical
24 argument at best, and a strained argument based on
25 the language in the rule.

1 To read the regulations for appeals
2 board review narrowly, as the Department has
3 sought to do here, would, I believe and Flying J
4 asserts, turn the environmental review process on
5 its head, and that can't be possibly be intended.
6 Frankly I'm surprised that the Department would
7 make such a strained reading of the Board's
8 environmental review authority, and frankly such
9 an illogical argument. There is so much at stake
10 in these administrative determinations.

11 What I would like you to do with me, if
12 you have an opportunity, and if you have the rule
13 in front of you, is to take out the rule at 40 CFR
14 124.15, the rule 124.15 that's captioned,
15 "Issuance and effective date of the permit." This
16 regulation clearly establishes the right, we
17 believe, to challenge a final decision to issue,
18 deny, modify, revoke, and reissue or terminate a
19 permit. It clearly gives the right to challenge a
20 final decision to issue a permit, and that's what
21 we're asking for here.

22 If you read the language, it says
23 specifically, "The regional administrator shall
24 notify the applicant and each person who has
25 submitted written comments or requested notice of

1 final permit decision." That Ms. Holmes did when
2 she sent the letter that I previously referred to.

3 It goes on to read that, "This notice
4 shall include reference to the procedures for
5 appealing a decision on a RCRA, UIC, PDS, or MPDES
6 permit under Section 124.19 of this part." And
7 then it goes on to say, of course, which I've
8 cited to, that, "For the purposes of this section,
9 a final permit decision means a final decision to
10 issue, deny, modify, revoke, and reissue or
11 terminate a permit."

12 This particular regulation did not lose
13 all of its meaning or its significance when
14 Section 124.19 was written, and when it was
15 approved as a Montana regulation. In fact, quite
16 the contrary, Section 124.19 specifically refers
17 to the rule at Section 124.15.

18 If you look at this in its literal
19 sense, as argued by the State, the State's
20 position makes no sense. Carrying the
21 Department's argument to its logical conclusion,
22 if this Board cannot review the Department's
23 decision to issue a permit but only permit
24 conditions, then similarly this Board cannot
25 review the Department's decision to deny or modify

1 a permit, only permit conditions.

2 And finally and importantly, I would
3 encourage you to read with me a pertinent part of
4 124.19(a), toward the bottom of that particular
5 regulation, where it reads as follows, and I
6 quote.

7 "A thirty day period within which a
8 person may request review under the section begins
9 with the service of notice of the regional
10 administrator's action unless a later date is
11 specified in that notice."

12 Keep in mind, there is a reference to a
13 regional administrator in that section. According
14 to the State, you would invalidate this rule
15 because there isn't a reference to what is
16 comparable in Montana to a regional administrator.
17 "Regional administrator" is a term that relates to
18 the United States Environmental Protection Agency.
19 And since this rule was incorporated by reference,
20 that term was left in the rule.

21 Similarly, the reference to an
22 Environmental Appeals Board was left in the rule,
23 but that didn't ipso facto mean that this
24 environmental board of review has absolutely no
25 authority over this matter, as the State would

1 argue.

2 Let's continue. The 30 day period
3 within which a person may request review under the
4 section begins with the service of the notice of
5 regional administrator's action unless a later
6 date is specified in that notice."

7 The rule goes on to read as follows:
8 "The petition shall include a statement of the
9 reasons supporting that review, including a
10 demonstration that any issues being raised were
11 raised during the public comment period (including
12 any public hearing) to the extent required by
13 these regulations, and when appropriate, a showing
14 that the condition in question is based on, one, a
15 finding of fact or conclusion of wrong which is
16 clearly erroneous; or two, an exercise of
17 discretion or an important policy consideration
18 which the Environmental Appeals Board should in
19 its discretion review."

20 As you know full well, Flying J included
21 in its petition a number of broad assertions for
22 challenging the issuance of the permit. We
23 clearly made a record that we were challenging an
24 exercise of discretion of the Department with
25 regard to an important policy consideration.

1 Flying J's petition, I think if you go
2 back to the original petition, effectively
3 broached all of the subjects that are identified
4 in that last sentence of Section 124.19. We
5 certainly did challenge the State's or the
6 Department's exercise of its discretion.

7 I submit to the Board, and I think it's
8 important that we all come to some realization
9 with regard to this, had Flying J known in advance
10 that this would be the Department's interpretation
11 of this section -- in other words, that the
12 challenge could only extend to permit conditions
13 -- and that the Department would take such a
14 narrow view of the Board's authority to review a
15 permit decision; or had Flying J known in advance
16 that this was the State's interpretation of that
17 particular rule, and that that interpretation had
18 the force and effect of law -- which is what
19 they're submitting is the case today.

20 And in their motion for summary
21 judgment, frankly, ladies and gentlemen of the
22 Board, Flying J could easily have side stepped
23 this dilemma, and simply challenged each and every
24 one, all of the permit conditions, as an
25 inappropriate exercise of the Department's

1 discretion, and I don't think we'd be having this
2 discussion today.

3 In any event, the language of Section
4 124.19 confers discretion on the Board -- and I
5 think it's important for you to recognize that --
6 to nevertheless review the Department's decision
7 regardless of what the Department asserts in its
8 motion for summary judgment. In subparagraph 2,
9 there is a specific reference to the Environmental
10 Appeals Board -- which in this case can only mean
11 the Board of Environmental Review -- having
12 discretion to review exercises of discretion by
13 the Department or important policy considerations.

14 And we submitted, Flying J, that the
15 question of the State's issuance of a permit in
16 this context with regard to this facility covers
17 both of those requirements.

18 If the Department's new found
19 interpretation of this rule is endorsed by the
20 Board or otherwise, then Flying J requests the
21 opportunity to file an amended petition in which
22 we would challenge all of the permit conditions,
23 and we would challenge all of the permit
24 conditions as constituting an inappropriate
25 exercise of the State's discretion.

1 And I think frankly with that amended
2 petition -- which we don't believe should be
3 necessary -- we would accomplish what we would
4 have to in order to submit this issue to the
5 Board, even under a strained reading of the rule
6 as contained in the Department's motion for
7 summary judgment.

8 Very briefly, and I'll conclude, the
9 proposed order's conclusion that 40 CFR 124.19 --
10 and that's the proposed order that was issued by
11 Ms. Orr -- does not authorize the Board to review
12 the Department's decision to issue the final
13 permit is frankly mistaken. I've gone through
14 those reasons in detail, but to recap.

15 First, the portion of Flying J's
16 petition asking the Board to review the
17 Department's decision to issue the final permit is
18 by definition a request for review of a condition
19 of the permit decision under 124.19, and clearly
20 within the scope of authority for this Board to
21 review as set forth in Section 124.15, which I
22 referred to earlier.

23 Second, even though Section 124.19 as
24 adopted contains no express substitution of,
25 quote, "Board of Environmental Review," end quote,

1 for quote, "Environmental Appeals Board," end
2 quote, the Department apparently views that the
3 regulation nevertheless applies based on its
4 letter to Flying J in which it referred to the
5 appeal; and in any event, the substitution is
6 necessarily implied in order to give meaning and
7 effect to a duly promulgated rule of the State of
8 Montana, and we've cited to the case authority,
9 including Montana Supreme Court authority, in our
10 briefing papers that stand for that proposition.

11 Finally, Board, I would suggest that
12 Flying J should not be punished for the State's
13 failing in clarifying its own regulations on both
14 of these topics, with regard to the ability of
15 someone in the regulated community to challenge
16 the issuance of a permit, and also with regard to
17 the assertion that the Department has made with
18 regard to the terminology of "Board of
19 Environmental Review."

20 So I stand ready and available to answer
21 any questions that you have, but I'll cede time to
22 Mr. Christie.

23 CHAIRMAN RUSSELL: Thank you, John.

24 MR. CHRISTIE: Thank you. My name is
25 Keith Christie. I'm an attorney with the

1 Department of Environmental Quality. Chairman
2 Russell, members of the Board, it's my pleasure to
3 appear before you today as to this matter. I
4 would like to give you a brief summary of where
5 we're at procedurally in this case.

6 Flying J did file a petition to appeal a
7 permit issuance by the Department -- this occurred
8 back in 2004 -- and a large part of their petition
9 for appeal was based on their argument that the
10 Department exceeded its authority in issuing a
11 permit, rather than an order on consent or
12 alternative mechanism.

13 The Department made a motion for partial
14 summary judgment as to that narrow issue as to
15 whether the Department has the discretion to issue
16 a permit rather than an order on consent or other
17 alternative mechanism. That motion for partial
18 summary judgment was filed by the Department back
19 in December. Ms. Orr, the Hearing Officer in this
20 case, heard oral argument on that motion for
21 partial summary judgment, and issued a proposed
22 order, the proposed order being before the Board
23 today.

24 I guess I would like to just concentrate
25 on a few specific items. I believe Mr. Fognani

1 shot very broadly in terms of his argument. I
2 think the Board, in terms of the matter before the
3 Board today, the Board need only look to the
4 specific language of a regulation that's been
5 adopted by the State Hazardous Waste Program, and
6 by essentially the Department's Hazardous Waste
7 Section.

8 And this is a federal regulation
9 incorporated by reference in the Administrative
10 Rules of Montana. I've cited it in the brief that
11 I filed as to this matter; Ms. Orr has cited it in
12 her proposed order; she specifically refers to it
13 in her proposed order; and that's the section at
14 40 CFR 270.1 Sub(c) Sub(7) It specifically gives
15 the Department the discretionary authority to
16 issue a permit instead of an alternative mechanism
17 as to the Department's discretion.

18 And that specific language I've set
19 forth at Page 3 of the Department's answer to
20 Flying J's exceptions to the proposed order, and
21 states specifically, "At the discretion of the
22 regional administrator" -- and in the
23 incorporation of terms of the CFR regional
24 administrator, "department director" is
25 substituted for "regional administrator" -- "At

1 the discretion of the regional administrator, an
2 owner/operator may obtain in lieu of a
3 post-closure permit and enforceable document,"
4 etc.

5 Again, the key language there is "at the
6 discretion of the regional administrator," or as
7 in this case, the Department of Environmental
8 Quality. That's a point that Flying J fails to
9 acknowledge, or fails to address in their
10 exceptions.

11 Again further, the proposed order that's
12 before the Board today specifically refers to
13 Montana statutory law, under the Montana Hazardous
14 Waste Act, which authorizes the Board to review
15 conditions of the permit and challenges to permit
16 terms. That's in the Montana Hazardous Waste Act
17 at Section 75-10-406 of the Montana Code.

18 The proposed order again specifically
19 refers to, further, the Montana statutory law
20 authorizing the Department to set terms and
21 conditions necessary to protect human health and
22 the environment. Again, that's at 75-10-406 of
23 the Montana Code.

24 These are items that are well documented
25 in the proposed order, these are items that are

1 well reasoned in the proposed order, and I'm here
2 before the Board today personally to state that
3 the Board can rule on this proposed order today.
4 There is no reason for the Board to not approve
5 the proposed order. It's a well-reasoned,
6 well-decisioned, well-written decision.

7 Flying J makes esoteric arguments as to
8 certain points of federal regulation, and I'll
9 just briefly comment on the two regulations that
10 Flying J's attorney, Mr. Fognani has referred to,
11 40 CFR 124.15, which refers to a mandatory
12 procedural duty of the Department to make a
13 decision as to permit status. 40 CFR 124.19, on
14 the other hand, refers to this Board's authority
15 to review conditions of a permit. That language
16 is stated specifically in 40 CFR 124.19.
17 "Condition of the permit" is the language that's
18 in that.

19 Again, I'll wrap up at this point to try
20 to be brief, and I think it's a fairly simple
21 issue. What's before the Board today is a
22 decision as to the discretion of the Department on
23 issuance of a permit or other alternative
24 mechanism or alternative order. Specific language
25 in the Code of Federal Regulation allows the

1 Department that discretion.

2 The proposed order that's before the
3 Board today refers specifically to that
4 regulation, and refers specifically to support on
5 that regulation in the recommendation on the
6 proposed order.

7 So once again, I would conclude by
8 saying that the Board can rule today on this
9 matter, it should rule today on this matter.
10 There is no reason to hold this in abeyance any
11 longer. This proposed order has been essentially
12 sitting out here for two months.

13 With that, I would be pleased to
14 entertain any questions.

15 CHAIRMAN RUSSELL: Thanks, Keith. Any
16 questions for Department's Counsel?

17 (No response).

18 CHAIRMAN RUSSELL: Thank you. Any
19 discussion of the Board before we make decisions?
20 Katherine, do you have any clarification?

21 MS. ORR: I'd be glad to answer any
22 questions if you would like me to kind of quickly
23 give you --

24 MR. FOGNANI: I'm sorry. I can't quite
25 hear Ms. Orr.

1 MS. ORR: I'd be glad to give you a road
2 map through this, if you would like, or discuss
3 procedurally where we are. I can give you my
4 impression or characterization of the relative
5 arguments by the Department and Flying J, whatever
6 is your pleasure.

7 But we're here today to address whether
8 or not the order that I issued on the motion for
9 partial summary judgment should be adopted by the
10 Board basically. And we do have a request by Mr.
11 Fognani to suspend consideration of that order
12 pending further determination of whether this can
13 go to a full hearing, and I didn't quite
14 understand that. I guess I'd have to entertain
15 something in writing regarding that, and then make
16 a recommendation to the Board regarding that.

17 CHAIRMAN RUSSELL: Maybe to kick this
18 off, Katherine, on May 19th I signed, on motion by
19 the Board, an order; and that order in essence is
20 being contested, is how I look at it.

21 MS. ORR: Yes. Well, on May 19th, what
22 do you mean by that?

23 CHAIRMAN RUSSELL: Basically on May
24 19th, did I not sign an order that -- The last
25 paragraph states, "Based upon the above, the Board

1 hereby rules that a portion of Flying J's petition
2 pertaining to review by the Board of the
3 Department's decision to issue a permit instead of
4 an order is not reviewable by the Board. Partial
5 summary judgment is granted to the Department
6 concerning this issue."

7 MS. ORR: That's for today. The Board
8 hasn't considered this order. In the last meeting
9 that we had in June, it was determined that there
10 would be exceptions, and the Board -- this didn't
11 come before the Board in June. So --

12 CHAIRMAN RUSSELL: Got it.

13 MS. ORR: Anyway, I guess the first
14 order of business is for the Board to determine
15 whether it wants to suspend consideration of the
16 order in response to Mr. Fognani's request that
17 there be a suspension pending a determination of
18 whether there'll be a full hearing in this matter.

19 MR. FOGNANI: Mr. Chairman, I'm happy to
20 elaborate on that if that would help.

21 CHAIRMAN RUSSELL: Briefly, John. That
22 would be fine, but let's keep it brief.

23 MR. FOGNANI: Briefly just two points
24 really. It cannot be that simply because the
25 Department has discretion, that that discretion is

1 never reviewed by this Environmental Board of
2 Appeals. No department anywhere, at least not in
3 this country, has unbridled discretion to make a
4 determination without having it subjected to this
5 type of board review.

6 But my suggestion is this: With regard
7 to the motion for summary judgment, it really is
8 not of paramount importance to address the issue
9 today and to reach an order of determination today
10 if in fact this matter never goes to a hearing
11 before the Board. In other words, if for whatever
12 reason -- there could be a variety of reasons. We
13 settle with the Department, and we come to some
14 determination as to how we proceed from here; or
15 it could arguably be a situation where Flying J
16 withdrew its petition, or for whatever reason,
17 there may be no reason to proceed to the Board
18 hearing -- then there is absolutely no reason to
19 have rendered a decision on a motion for summary
20 judgment that is of no consequence with respect to
21 a determination on a final hearing by the Board.

22 So my view is that this is in a sense
23 almost in the nature of what I would consider to
24 be an advisory opinion that Courts typically would
25 never render, because this may never come to pass,

1 the hearing may never come to pass, and there may
2 be some determination by the Board that sets a
3 precedent for future purposes that perhaps was not
4 intended in a case that never effectively
5 officially went before the Board for a hearing.

6 So my assertion is if in fact both sides
7 decide that they are going to avail themselves of
8 the opportunity to appear before the Board for a
9 three day hearing or four day hearing, in that
10 event, and once that determination has been
11 crystallized, then it would make sense for the
12 Board to take up this issue on a motion for
13 summary judgment in order to reduce the issues
14 that then have to be considered by the Board at
15 the hearing.

16 Otherwise I suggest to you that this is
17 in effect until that point a rather meaningless
18 motion. That was my point of procedure, is that
19 there is no reason necessarily to reach the issue
20 today, because this in fact may never have any
21 ultimate consequence, except to provide precedent
22 that either the State likes or the State doesn't
23 like, in a case that never goes back before the
24 Board.

25 CHAIRMAN RUSSELL: Katherine, for us

1 non-lawyer types like me, I have a little trouble
2 with this. When someone is granted summary
3 judgment on something, what is it based on?

4 MS. ORR: It based on a determination
5 that there are no issues of fact that are in
6 dispute, and that the case can be determined as a
7 matter of law.

8 CHAIRMAN RUSSELL: And when we go
9 through the different sections of this, it appears
10 that the Montana Code looks pretty clear about
11 that there is some discretion on the Department
12 how they handle a matter like this.

13 MS. ORR: Well, as you can tell, this is
14 a case where the issue of the Board's authority to
15 review this matter is a question of law, and that
16 turns on an interpretation of the federal
17 regulations, and the State statutes and the State
18 rules. And that's why for all of you, it must
19 sound rather convoluted and very difficult to
20 interpret, because you don't have the language in
21 front of you.

22 But at this point, I guess what we have
23 here is a decision point regarding this request,
24 and since what we're looking at today is this
25 decision on the motion for partial summary

1 judgment, that is what is correctly before the
2 Board, I would submit.

3 The issue of suspension of this
4 determination is not appropriately before the
5 Board, it's before me. And we could hear the
6 Department's response to that, and I could make a
7 ruling on that, but I would submit that at this
8 point it's fairly late to have submitted to the
9 Hearing Officer a request like that.

10 MR. FOGNANI: You've already heard from
11 the Department, I believe, on its position.

12 MS. ORR: I think the Department is
13 objecting.

14 MR. FOGNANI: I understand, but it seems
15 to me that this is sort of a discretionary issue,
16 again, that can be taken under advisement by the
17 Board, or determined by you and referred to the
18 Board, Ms. Orr. But again, it seems to me to be
19 unfortunate to have to make a decision today on an
20 issue that may never have to go forward, and in a
21 hearing that may never go forward.

22 Unfortunately, if the determination is
23 against Flying J, we're in a position where we
24 have to appeal that decision to a Court in Montana
25 within thirty days. We will have no alternative

1 if the decision is adverse but to appeal, and
2 perhaps on the other side, the State would have no
3 alternative if it's not in its favor to appeal,
4 because we have a thirty day time clock that's
5 ticking that neither side can ignore with regard
6 to a decision that's made today.

7 MR. CHRISTIE: Mr. Chairman, could I
8 respond to some of the comments that Mr. Fognani
9 is making?

10 At this point, the Department believes
11 it's entirely appropriate and it's entirely proper
12 for the Board to rule on the proposed order that
13 was issued by the Hearing Officer on May 19th.
14 It's a procedural matter. These are matters that
15 are set forth under Rules of Procedure that have
16 been essentially on the books for years, and
17 years, and years. This is how these type of cases
18 work. A party has the opportunity to ask a
19 tribunal, or a board, or a court to make an order
20 as to certain issues before it, and that's what
21 the Department is doing and that's what the
22 Department is requesting the Board do today.
23 Thank you.

24 MR. FOGNANI: Mr. Chairman, there is
25 absolutely no basis for the Board not being able

1 to assert its own discretion to deal with this
2 issue. You do have broad administrative
3 authority, and if you think, for whatever reason,
4 that this may ultimately not be necessary, it
5 isn't an absolute requirement that you issue a
6 determination today. You do have the authority to
7 make that decision not to or to do it.

8 CHAIRMAN RUSSELL: John, let's see what
9 the discretion of the Board is. Do I have a
10 motion that we can get this kicked off with?
11 Don.

12 MR. MARBLE: I have a question. This is
13 Don Marble, one of the members of the Board.

14 I have a hard time -- I agree with Mr.
15 Fognani. It seems to me that any condition of the
16 permit would include or could include whether you
17 grant the permit or not, so I don't think that's
18 unreasonable construction of that rule. But I
19 wondered if either side here, if there is some
20 Court decisions directly on that point, state or
21 federal. I guess the federal ones are relevant,
22 too. It would be interesting hearing that.

23 MR. CHRISTIE: Mr. Chairman, Mr. Marble,
24 I've searched through the Lexus data base. I
25 cannot find any Court opinions specifically

1 interpreting the clear language which is at 40 CFR
2 270.1(c)(7). And again, Member Marble, I would
3 point you -- if you have that in your packet, it's
4 called the Department's Answer to Flying J
5 Petroleum's Exceptions to Proposed Order. I've
6 set forth the language of that federal regulation
7 on Page 3, and it's clearly stated that it's at
8 the discretion of the regional administrator; and
9 when that regulation is incorporated by reference
10 into the Montana rules, "Department Director" is
11 substituted for "regional administrator."

12 So again, possibly the reason why there
13 is no Court opinions on record that either myself
14 or Flying J's Counsel could cite to you is that
15 the language is so clear, clearly stated, that it
16 is at the discretion of that regional
17 administrator, that no Court has had the
18 opportunity to make an opinion on that.

19 MR. FOGNANI: Let me just briefly state
20 a response, since Mr. Christie has --

21 CHAIRMAN RUSSELL: We're giving you a
22 lot more latitude than you would -- John, I think
23 we're going to cut this off.

24 MR. FOGNANI: Let me just suggest, Mr.
25 Chairman, that Mr. Marble asked a question, and

1 Keith Christie was allowed to provide a response.

2 I was not.

3 CHAIRMAN RUSSELL: Do you want his
4 response?

5 MR. MARBLE: Yes, I want to hear
6 something.

7 CHAIRMAN RUSSELL: Then we're done.
8 We're going to deliberate on this, and we're going
9 to be done with it.

10 MR. FOGNANI: I think that's fine.
11 There could very well -- We've searched the data
12 base. We haven't found anything. We tried to
13 stick to Montana law, which is what we cited in
14 our briefing papers. I cannot answer your
15 question, Mr. Marble, with a definite statement,
16 "Yes, that we know there is nothing else out
17 there."

18 I would take the other side of the
19 argument, however. I don't believe any state
20 would have frankly the hutspace (phonetic) to take
21 this kind of an argument to a board where you
22 would have had a judicial determination that
23 addressed this issue, because I think most states
24 take the position that administrative review of
25 department decisions should be fairly widely made

1 available.

2 So I would suggest just the reverse of
3 what Mr. Christie did. The reason we don't see
4 decisions on this is because typically you
5 wouldn't find states trying to deny the regulated
6 community the opportunity to have the very
7 decision to issue a permit heard by an
8 administrative review board.

9 CHAIRMAN RUSSELL: Well, that brings up
10 a point. We are an administrative review board,
11 and if there isn't law out there, it's certainly
12 not going to be decided by us, it's going to be
13 decided in a Court.

14 I have an order in front of me, and I
15 will entertain a motion to accept that order, and
16 authorize the Board Chair to sign. With a motion,
17 and second, we can further discuss this. Do I
18 have a motion?

19 MS. LACEY: Kim Lacey. So moved.

20 CHAIRMAN RUSSELL: Is there a second?

21 MR. FOGNANI: I'm sorry. I didn't hear
22 what the motion was.

23 CHAIRMAN RUSSELL: To accept the order
24 and authorize the Board Chair to sign it.

25 MS. SHROPSHIRE: Second.

1 CHAIRMAN RUSSELL: It's been seconded by
2 Robin. Further discussion? Don, you seem to have
3 concern with the process here.

4 MR. MARBLE: Would I be out of order to
5 make a substitute motion that we --

6 CHAIRMAN RUSSELL: You would be out of
7 order at this time. Let's discuss the motion on
8 the floor.

9 MR. MARBLE: My feeling is any condition
10 of the permit would include the issue of whether
11 or not we grant the permit. There is no Court
12 decisions. I think it would be inappropriate to
13 make that decision now. If they want a hearing,
14 let's go to the hearing, and they can argue that
15 point further as we go on, because summary
16 judgment is when there is no question about the
17 status of the law, and I think there is a question
18 about the status of the law here.

19 So I'm not going to vote for that
20 motion. I think we should not approve that
21 motion, so --

22 CHAIRMAN RUSSELL: I keep reading 40 CFR
23 -- blank blank -- subpart (7), "Enforceable
24 documents for post-closure care." Has everyone
25 read that?

1 (Mr. Rossbach enters)

2 MS. SHROPSHIRE: Are we starting over
3 for Bill?

4 CHAIRMAN RUSSELL: No, we're not
5 starting over for Bill. Bill, thanks for joining
6 us. We're discussing Flying J. There is an order
7 in front of us. Probably since you didn't hear
8 the arguments, you probably shouldn't participate.

9 MR. MARBLE: I'll add one more thing. I
10 don't think it would be, in my opinion,
11 appropriate for us to vote to limit our own
12 ability to review things when there is no law on
13 whether we can or can't do that. So I think
14 that's another reason. I think we should go ahead
15 with the hearing, and let's hear more argument on
16 these issues.

17 MS. SHROPSHIRE: I guess I would, Mr.
18 Chairman, say I didn't -- I guess I don't
19 understand.

20 MR. FOGNANI: I didn't hear the other
21 Board member.

22 MS. SHROPSHIRE: I didn't understand
23 that we were limiting our review, or that we were
24 doing that.

25 CHAIRMAN RUSSELL: And granted, I'm not

1 a lawyer, and I don't practice as one even if I do
2 stay at Holiday Inn Express. But if we accept the
3 order, and that -- it's done. That part is done.
4 That part of it is done, and it will not be argued
5 in the hearing. The rest of it is, but the basis
6 of this order is just regarding that matter. The
7 hearing will still go ahead.

8 The Department moved for summary
9 judgment to clear off some of the stuff that they
10 felt was material fact, and if we don't believe
11 that that is true, then don't vote for the motion
12 on the floor. If you believe that there is enough
13 fact to move on that, on that issue, then we
14 accept the Hearing Examiner's report, and we get
15 rid of this section of the case.

16 MR. FOGNANI: Mr. Chairman, we assert
17 that there are controverted facts here.

18 CHAIRMAN RUSSELL: John, we're done.
19 We're deliberating, and you're not speaking
20 anymore.

21 MR. FOGNANI: I apologize.

22 CHAIRMAN RUSSELL: Any further
23 discussion?

24 MR. SKUNKCAP: Mr. Chairman, something
25 -- we're not limiting our decision, but Don, can

1 you explain yourself one more time, please.

2 MR. MARBLE: This is Don Marble. Well,
3 it's my understanding that summary judgment is
4 appropriate when there is no questions of facts or
5 law, and we're interpreting a section of Section
6 124.19, I think, that the issue, as I understand
7 it, does -- they can appeal any condition of the
8 permit decision. And does that mean just internal
9 parts of the permit, or does that mean actually
10 whether or not the permit was granted? And there
11 is no law, no decisions on this. It seems to me
12 you could interpret that, and it could be a broad
13 interpretation of those, yes, that would include
14 whether or not the permit is granted.

15 So I think there is a big question mark
16 there as to what is the status of the law, and so
17 I don't think that deciding such an issue by
18 summary judgment is appropriate. We should go to
19 the full hearing, and that's something else they
20 need to argue about further at the full hearing.
21 I don't think it's appropriate to cut off a
22 decision on that point now, and in effect to limit
23 our decision, and to hear all of the issues at the
24 hearing.

25 So Gayle, I don't know if that gives you

1 any help, but that doesn't mean that the whole
2 thing is -- it will be argued on further as the
3 hearing goes forward, it just means they're not
4 cut off from arguing about it further.

5 MS. SHROPSHIRE: Can I ask Katherine to
6 clarify. Katherine, can you add to that, or say
7 whether or not you agree.

8 MS. ORR: Mr. Chairman, members of the
9 Board, this isn't a matter of review of the
10 Department's --

11 MR. FOGNANI: Mr. Chairman, I apologize.
12 I know this is inconvenient for you all, and
13 again, I do apologize. But I'm sorry, I can't
14 hear.

15 CHAIRMAN RUSSELL: We'll accommodate
16 that.

17 MS. ORR: This isn't a matter of review
18 of the Department's decision to grant or deny a
19 permit. This is a different situation. This is a
20 petition that was filed by Flying J challenging
21 the Department's decision to issue a permit as
22 opposed to an order.

23 So the question before the Board is
24 whether the Board believes that it has review
25 authority over the Department's -- what I would

1 call -- an enforcement decision to issue a permit
2 rather than an order. That's the issue in this
3 case, whether or not this Board has review
4 authority to second guess the Department's
5 enforcement decisions.

6 Another example of that would be: The
7 Department decides to issue a penalty in an NOV in
8 the amount of \$1,500 as opposed to \$2,500. We do
9 have some statutes that give the Board express
10 authority to review that kind of decision. And
11 all that this case comes down to is whether or not
12 in 17-10-406(4), this Board has the authority to
13 second guess an enforcement decision like that.

14 And I can read you that language. And I
15 would say that the opinion that I wrote is rather
16 restrictive. It says, for one thing, that the
17 Board's authority here is a creature of statute,
18 and so you look to the statutes and the sections
19 in the hazardous waste law and permitting to see
20 what the Board's review authority is. That's what
21 this case comes down to.

22 And I am saying, in a very simple and
23 direct fashion, that this Board can review
24 Department decisions as to the condition of a
25 permit, but it can't second guess the decision of

1 the Department concerning whether it wanted to
2 issue an order on consent to handle corrective
3 action at this site, or whether it wanted to
4 handle the contamination and the storage facility
5 there and the disposal through a permit. They
6 have their reasons for that, and I'm saying the
7 Board can't second guess that.

8 MR. FOGNANI: Mr. Chairman, for the
9 record, I must note on behalf of Flying J that Ms.
10 Orr is making arguments as an advocate for the
11 Department, not as an independent Hearing Officer
12 who should let her written determinations stand or
13 fall on the basis of what she provided in the
14 document itself.

15 And I'm offended by that, frankly,
16 because the Department made its own argument, and
17 she's acting as an advocate for the Department,
18 which I think is terribly inappropriate, and I
19 want to make a record notation of that fact.

20 There is nothing more basic than a Board
21 reviewing a decision by a Department to issue a
22 permit. It so states it in the regulation, and
23 you're emaciating the authority of the Board if
24 you determine that the Board cannot make that kind
25 of a determination.

1 CHAIRMAN RUSSELL: Thank you, John. I
2 guess you objected.

3 Robin, do you have something else you
4 want to get clarified?

5 MS. SHROPSHIRE: Well, I guess my
6 understanding was that we weren't voting on the
7 general authority of this board, but just this
8 actual case, in that in this particular case, it
9 was acceptable -- and maybe I'm misunderstanding
10 the motion -- acceptable for DEQ to give them a
11 permit rather than an order, but not in a general
12 -- in all cases. So I guess I'm not --

13 CHAIRMAN RUSSELL: And maybe I'm just a
14 skosh bit more clear. The Department, in post
15 closure, issued a permit. That was their
16 discretion. The basis of this whole issue is they
17 issued a permit; they didn't issue an
18 administrative order or anything else, they issued
19 a permit. And apparently that's caused some
20 problems with Flying J, and they're contesting
21 that we have authority to overturn that decision
22 for the Department to issue a permit, and it
23 doesn't appear that we have authority to do that,
24 and it appears that the Department has discretion
25 to issue a permit, or an administrative order, or

1 whatever they deem by the law.

2 And since I'm on the Board, I can
3 actually do this, John.

4 Any other questions? There is certainly
5 some confusion here. We do have a motion. We can
6 find out how it all plays out, and it might go or
7 it might be contested in a different court. Any
8 further discussion before the Board takes action
9 on the motion?

10 (No response).

11 CHAIRMAN RUSSELL: Hearing none, all
12 those all those in favor, signify by saying aye.

13 MS. LACEY: Aye.

14 MS. SHROPSHIRE: Aye.

15 CHAIRMAN RUSSELL: Aye. Opposed.

16 MR. SKUNKCAP: No.

17 MR. MARBLE: No.

18 MS. KAISER: No.

19 CHAIRMAN RUSSELL: Bill, I don't think
20 you can go, so it's three to three.

21 Let's just do a roll call. All those in
22 favor, signify by saying aye. Robin?

23 MS. SHROPSHIRE: Aye.

24 CHAIRMAN RUSSELL: Gayle.

25 MR. SKUNKCAP: Aye.

1 CHAIRMAN RUSSELL: You are in favor?

2 MR. SKUNKCAP: I said aye between -- I
3 was riding the fence.

4 CHAIRMAN RUSSELL: So you are moving for
5 summary judgment?

6 MR. SKUNKCAP: Aye.

7 CHAIRMAN RUSSELL: Heidi?

8 MS. KAISER: Opposed.

9 CHAIRMAN RUSSELL: Don?

10 MR. MARBLE: Opposed.

11 CHAIRMAN RUSSELL: Joe, aye. Kim?

12 MS. LACEY: Aye.

13 CHAIRMAN RUSSELL: The Hearing Examiner
14 report is affirmed, and the Board will sign the
15 order -- or the Board Chair will sign the order.
16 Thank you, John for joining us.

17 MR. FOGNANI: Mr. Chairman, may I ask
18 one question as a point of order? Since Flying J
19 will have to appeal this determination to a
20 judicial forum, to a Court in Montana, we would
21 request that you consider -- and of course, we'll
22 make this request formal -- that you consider a
23 stay of any hearing in this matter before the
24 administrative body until after that judicial
25 determination is made. I think we're left with no

1 alternative but to request that under the
2 circumstances because this is very important to
3 our appeal.

4 CHAIRMAN RUSSELL: John, I would agree,
5 and I'm sure that you will make that to Katherine
6 as soon as possible, as our Board attorney; and if
7 we need to make a decision, if Katherine believes
8 we need to make a decision on that, we will hold a
9 special hearing to stay the rest of it.

10 MR. FOGNANI: Since I'm not there, Mr.
11 Chairman, I know that there were three ayes and
12 three nays originally.

13 CHAIRMAN RUSSELL: No, there weren't.
14 Gayle was a little slow on the trigger. But the
15 people that voted for the order were Joe Russell,
16 Board Chair; Kim Lacey, Robin Shropshire, and
17 Gayle Skunkcap; Bill Rossbach joined us late and
18 abstained; Don Marble and Heidi voted no.

19 MR. FOGNANI: Okay. Thank you. I
20 appreciate your time.

21 CHAIRMAN RUSSELL: We're going to move
22 on now. Before we move on, we're going to take a
23 break.

24 (Recess taken)

25 ///

1 CHAIRMAN RUSSELL: We're going to head
2 back into this, and we're actually going to go --
3 since we're so far out of order on everything,
4 we're going to go to Agenda Item II.A.1, which is
5 executive summary for action on rule amendments.
6 And I believe that we have the three amigos there
7 ready to go, and Chuck is going to present, I'm
8 guessing.

9 MR. HOMER: Mr. Chairman, members of the
10 Board, this is the final action on the annual
11 incorporation by reference update. This is merely
12 updating those federal regulations that the
13 Department has incorporated by reference to the
14 current CFR. A hearing was held, and there was no
15 public comments, and the Hearing Officer report is
16 included in your packet. I would suggest you pass
17 this as noticed. Thank you.

18 CHAIRMAN RUSSELL: I do have an amended
19 rule, the Hearing Examiner's report, the 521 and
20 311 analysis; and if you would, I'll entertain a
21 motion to adopt all of that, since we're really
22 just incorporating everything by reference except
23 for the CAMR stuff.

24 MR. ROSSBACH: So moved.

25 CHAIRMAN RUSSELL: It's been moved by

1 Bill.

2 MS. KAISER: Second.

3 CHAIRMAN RUSSELL: Seconded by Heidi.
4 Any further discussion?

5 MR. MARBLE: I just wonder. Are
6 comments from the public in order or not?

7 CHAIRMAN RUSSELL: I guess that was a
8 good call. Is there anyone in the public that
9 would like to speak to this before we take action?

10 (No response).

11 CHAIRMAN RUSSELL: Seeing none, all
12 those in favor, signify by saying aye.

13 (Response).

14 CHAIRMAN RUSSELL: Opposed.

15 (No response).

16 CHAIRMAN RUSSELL: The next item on the
17 agenda is some Department briefings -- it's
18 actually the last few items, these briefings --
19 and the first one is on the mercury rule.

20 MR. LIVERS: Mr. Chairman, members of
21 the committee, for the record, Tom Livers for the
22 Department. Following the public hearings on this
23 rule last month in Great Falls and Billings,
24 several Board members had expressed some interest
25 in providing an opportunity as a Board to spend

1 some time talking about this rule prior to taking
2 action in September, so that's essentially the
3 purpose of the discussion today.

4 We also wanted to make sure that given
5 the fact that this rulemaking is multifaceted,
6 it's a complex rulemaking, we wanted to make sure
7 that folks understood the different components,
8 and how they interact, and had an opportunity to
9 ask some questions on those as well.

10 So what we envision today is the staff
11 to the Board will quickly outline our
12 recommendations; then we will provide a real brief
13 walk through on kind of a piece by piece,
14 component by component basis, of the different
15 pieces of this issue, the mercury issue, and just
16 make sure there is an understanding of what things
17 do and don't do, and provide an opportunity for
18 Board questions and discussion.

19 So we don't want to dominate this piece
20 of the agenda, but we do want to just help the
21 Board kind of work through that, so that there is
22 a little more depth of understanding, make sure
23 that if you folks have some questions on different
24 pieces, you have an opportunity to get those
25 aired, and then also have an opportunity to

1 discuss them back and forth.

2 A couple things I do want to just remind
3 the Board. Since you have not yet had an
4 opportunity to review the entire record and all of
5 the comments, no decisions will come out of this
6 meeting. That won't happen until you do have an
7 opportunity to get all those comments. And we
8 anticipate this stage -- we're looking at mid
9 August -- we'll have those all processed and out
10 to the Board members.

11 It's pretty voluminous. We're looking
12 at a pretty good sized paper box of comments on
13 this issue.

14 One other thing I guess I wanted to
15 mention for consideration. We were looking at the
16 schedule on this, and we have two issues, two
17 timing issues we have to be mindful of. One is
18 making sure this is adopted prior to the CAMR
19 deadline, if the Board chooses to go that
20 direction. The other is that any action is taken
21 within the six month time frame, and that proves
22 to be the critical path. That's more restrictive.
23 That deadline is coming up sooner than the CAMR
24 deadline.

25 So the way it stands right now, this is

1 scheduled to be acted on at the September 29th
2 Board meeting. That leaves us frankly an almost
3 impossibly short amount of time to react to
4 whatever the Board ultimately decides, and to
5 craft a final rule, and still meet the six month
6 deadline for the rulemaking.

7 So we don't have to decide this now,
8 although I would like to talk about it, and
9 ideally reach a decision before the end of today.
10 We would like to propose, if it's at all possible,
11 the Board consider rescheduling, moving up its
12 September meeting two or three weeks, somewhere in
13 that time frame, if it's possible to find a day
14 that works. I realize that is going to be
15 difficult. But that would be our optimal solution
16 to carve out enough time for us to respond, not
17 knowing what action the Board is going to take
18 until that action happens.

19 So we would be looking at sometime in
20 the first couple of weeks of September, and we can
21 come back to that.

22 MS. SHROPSHIRE: We're looking at a
23 separate meeting, or moving the actual meeting
24 date?

25 MR. LIVERS: Mr. Chairman, Ms.

1 Shropshire, we can go either way. I guess I'm
2 mindful of the demands we're putting on your time,
3 and that's why I was thinking rather than adding a
4 meeting, we would just probably try to move that
5 meeting now.

6 What it would probably entail then is
7 the Board would take action; we would then see
8 what that action looks like and draft the rule;
9 and then there would be a formal adoption of that
10 rule that would have to take place, but that could
11 easily be done in a fifteen minute conference
12 call, maybe still on September 29th, if that
13 works.

14 MS. SHROPSHIRE: When did the comment
15 period end?

16 MR. LIVERS: July 6th.

17 MS. SHROPSHIRE: And the sooner we can
18 get those comments before that meeting --

19 MR. LIVERS: And we will push that. One
20 thought that we haven't talked about yet, but we
21 may just bring on some temporary help to get the
22 processing of those, and see if we can get that
23 out to you quicker, because you guys obviously are
24 going to have a lot of time getting through the
25 entire record.

1 MS. SHROPSHIRE: That would be great.

2 MR. LIVERS: We don't have to decide
3 schedules now, but I think we might want to swing
4 back and revisit that.

5 And I don't want to get off track, but
6 as we talk about schedules, the only other
7 consideration we might also want to talk about
8 later on in the day or later this morning is there
9 is a request from the Fort Belknap Indian
10 community that the Board get up to Zortman
11 Landusky, and I think there was a lot of interest
12 expressed in doing that.

13 We can talk about whether it's possible
14 to do this summer, and if so, how we might do
15 that; and whether we go as a Board, or in which
16 case, if there is ever a quorum there, to we're
17 concerned about issues of open meeting, break it
18 into smaller groups, and we can facilitate that as
19 well.

20 So we don't have to talk about that now,
21 but that will be another scheduling issue as we
22 take a look at moving the September meeting that
23 we just want you to be aware of. And I guess,
24 again, given all those demands we're put on your
25 time, that's why our recommendation would be not

1 add a meeting, but just move the September
2 earlier. So I didn't mean to belabor the
3 scheduling discussion, but that's something we'll
4 probably need to spend some time with.

5 CHAIRMAN RUSSELL: Thanks, Tom.

6 Is this a scheduling matter?

7 MR. SKUNKCAP: I just have a comment,
8 Mr. Chair. I would strongly recommend that the
9 Board do make that trip to Fort Belknap to view
10 the sites. Thank you, Mr. Chairman.

11 CHAIRMAN RUSSELL: Would you want to
12 revisit that, Gayle, since you were there just
13 recently?

14 MR. SKUNKCAP: I did a tour there by
15 myself with the members there and the State. They
16 sent me back some samples, and that's what I had a
17 question on those. They sent me some soil and
18 rock samples, and water samples. Can I drop those
19 anywhere, or what's the direction on those?

20 CHAIRMAN RUSSELL: Would they want the
21 Department to do some testing on those samples?

22 MR. SKUNKCAP: They would like for the
23 Department to do testing on those, and I have
24 those with me.

25 MR. LIVERS: Mr. Chairman, Mr. Skunkcap,

1 we can talk after the meeting, and I can take care
2 of getting that to the right folks. So what I
3 would suggest is maybe we'll go ahead and proceed
4 through the mercury discussion, talk a little bit
5 about the scheduling of the September meeting, and
6 then before the end of the meeting, we can talk
7 about different options for Board members to get
8 to Zortman Landusky.

9 MR. SKUNKCAP: Thank you, Mr. Livers,
10 and thank you, Mr. Chairman.

11 MR. OPPER: Mr. Chairman, members of the
12 Board, for the record, Richard Opper, the Director
13 of the Department of Environmental Quality. And
14 I'm going to talk a little bit about the mercury
15 rule, our recommendations from the Department on
16 the mercury rule.

17 And I'm doing this hopefully to provide
18 some clarification, because we sense that there is
19 confusion about where the Department's position is
20 right now. The Department is in a unique position
21 right now because we are going to be coming to the
22 Board with the final recommendation for your
23 consideration. And so hopefully I'm here to
24 provide some clarification with this, basically a
25 Mercury Recommendations 101 presentation here.

1 And that's what I'm intending to do.

2 I know there has been some confusion.
3 I've been confused about what our position is.
4 I've gotten a lot of exercise running downstairs
5 to talk to these folks, our staff in the Air
6 Quality Bureau, to find out where we were. So I
7 would like to go over this relatively quickly and
8 relatively simply to talk about the Department's
9 position at this point.

10 I see a wrinkled brow.

11 MS. SHROPSHIRE: I guess I thought you
12 guys did that at the hearing. That's why I'm
13 confused.

14 MR. OPPER: I think at the last hearing,
15 we saw lots of wrinkled brows. We would like to
16 try again, because I think there was a lot of
17 confusion about where the Department was.

18 MS. SHROPSHIRE: This isn't new comment?

19 MR. OPPER: No. We don't see that as
20 new comment. So if I could proceed here.

21 I'm going to start in the year 2018,
22 because that's when the final requirements of the
23 rule is going to be in place, both the federal
24 Clean Air Mercury Rule, the CAMR rule, and for our
25 rule.

1 And so we know now that Montana is going
2 to have a budget of 298 pounds per year of mercury
3 emissions in 2018. That part is known. No
4 confusion there. That's about a third, actually
5 less than a third of what we're putting out now
6 from our existing facilities.

7 So I guess the first question to be
8 asked here that we had to address is: Is 2018 a
9 reasonable time frame for us to look at? Is it
10 too long? We certainly have heard from some
11 people that twelve years is an awfully long time
12 to wait for getting final mercury controls in
13 place.

14 The Department's thoughts on this are:
15 Every existing power plant in the country
16 essentially is going to have to install mercury
17 controls by 2018; and what this means is every
18 facility in the country is going to have to
19 coordinate their outages with other facilities,
20 they're going to have to compete for contractors,
21 so that's a problem that may result in a delay in
22 getting the final work done on some of these
23 facilities.

24 Mercury control technology, it's getting
25 better all the time. There are millions of

1 dollars being poured into research right now,
2 starting to pay off. Ten years from now, we
3 assume that technology is going to be a lot better
4 than it is right now. So there is some reasons to
5 wait before requiring the huge investment that
6 companies are probably going to have to put in
7 their existing plants, that new ones are going to
8 put in theirs, too, ultimately, because of the
9 fact that technology is getting better.

10 Three: Our rule is going to require a
11 significant reduction. Our recommendations right
12 now would require a significant reduction of
13 mercury emissions in 2010 anyway. So in four
14 years, our existing facilities are going to be
15 much cleaner than they are today. So it's not as
16 if, in this interim between now and 2018, that our
17 plants aren't going to be cleaner. There is going
18 to be some interim steps taken to make our plants
19 cleaner than they are now.

20 So we're proposing a new mercury
21 emissions standard in 2018 of .9 pounds per
22 trillion Btu. This is a standard, not a target.
23 And so we went with the .9 pounds per trillion
24 Btu. Why did we go with that? Some of the states
25 we're looking at, particularly eastern states, are

1 looking at a percent control of mercury as opposed
2 to pounds per trillion Btu. We didn't go that
3 way.

4 Eastern generally plants burn bituminous
5 coal, in some cases anthracite coal, that tends to
6 have a lot more mercury in it. So they may get 90
7 percent plus control of mercury, but they will
8 still be emitting more mercury than we would with
9 our coal that has less mercury, if with we go with
10 pounds per trillion Btu. I don't think the
11 percent control would necessarily give us the
12 reductions that we seek, just because our plants
13 have lower mercury in them than the bituminous
14 coal and the anthracite that's used in other
15 states.

16 So that's why we decided to go with .9
17 pounds per trillion Btu. We arrived at the .9
18 pounds per trillion Btu -- Pretty simply, it's
19 driven by the fact that we're going to have a
20 statewide budget of the 298 pounds per year that
21 our facilities can emit.

22 If all of our existing electric
23 facilities that come under this rule, plus the
24 Southern Montana Electric Power Plant, plus a
25 facility the size of the Roundup facility that's

1 being proposed, if all those were operating,
2 they're operating at full capacity, all these
3 plants would have to emit about .9 pounds per
4 trillion Btu in order to come in just under that
5 298 pound cap.

6 So we kind of did the math, we worked
7 our way backwards, that this was the standard that
8 had to be met, to make sure that our cap was not
9 exceeded.

10 Any questions so far?

11 MS. SHROPSHIRE: That includes Roundup?

12 MR. OPPER: Yes, Ms. Shropshire, that
13 does include the Roundup facility.

14 MR. MARBLE: From the hearings, I came
15 away with the opinion that when you consider
16 banking of credits, that actually the companies
17 will have until about 2025 to actually clean up.
18 Do you agree with that?

19 MR. OPPER: Mr. Chairman, Mr. Marble,
20 our proposal will not include the recommendation
21 for banking. I don't believe -- I would check
22 with that, but I don't believe that's a part of
23 what we're going to be recommending. That doesn't
24 preclude --

25 MS. SKIBICKI: They would still have to

1 comply with the emission, so banking becomes to
2 some extent irrelevant.

3 MR. OPPER: The point is that our rule,
4 our recommendations right now do not preclude
5 banking, but because we're going to have a hard
6 limit standard of .9 pounds per trillion Btu, the
7 banking issue becomes irrelevant, because that
8 standard can't be exceeded right now, so we don't
9 have really have the ability to bank the credits.

10 And I'm not sure if I explained that
11 adequately. Chuck, you're going to get a chance
12 to address that, too, after I'm done, so let me
13 move on here, if I could.

14 So if a facility emits more than .9
15 pounds per trillion Btu after 2018, it will be
16 guilty of an air quality violation. After 2018,
17 they'll be guilty of an air quality violation.
18 It's going to be subject to fines of up to \$10,000
19 a day.

20 And that facility won't be able to buy
21 its way out of that standard through a cap and
22 trade system, according to our recommendations.
23 Let me repeat that, because it's a very important
24 point. I think this has been misunderstood. No
25 plant in the state is going to be able to buy its

1 way out of our standard in 2018 through a cap and
2 trade program.

3 If our current recommendation is
4 adopted, what this means basically is that there
5 won't be any dirty plants relative to mercury
6 operating in the state after 2018; and by dirty,
7 I'm talking about exceeding our standards. That's
8 a very important point here. Mr. Chairman.

9 CHAIRMAN RUSSELL: One plant comes to
10 mind that's going to have trouble with that .9,
11 and that's one out in Sidney because of the type
12 of coal.

13 MR. OPPER: I will address that in a
14 minute, because we do make an exclusion for the
15 lignite coal. In fact, I'll get to that point
16 now.

17 Another thing we're proposing is that in
18 2018, the standard will be higher for plants that
19 burn lignite rather than subbituminous coal. The
20 standard for lignite facilities will be 2.16
21 pounds per trillion Btu rather than .9 pounds per
22 trillion Btu.

23 MS. LACEY: How much, Richard, 2.6?

24 MR. OPPER: 2.16. As all of you heard
25 at the mercury workshop we went to in Billings,

1 it's harder to scrub mercury out of lignite than
2 it is out of subbituminous, bituminous coal.
3 That's what I heard.

4 MR. MARBLE: That is not what I heard.

5 MR. OPPER: As some of you heard at the
6 workshop in Billings, it's harder, and the reason
7 it's harder is because lignite coal does not have
8 chlorine and other brominating agents in it that
9 make it easier to remove the mercury from the
10 lignite coal.

11 Now, again, so we're proposing a higher
12 rule right now for plants that burn lignite. If
13 the mercury technology improves, it may be even at
14 a faster rate for lignite coal than it does for
15 bituminous, we may want to revisit this aspect of
16 the rule in a few years.

17 So facilities -- We've talked about
18 what's going to happen in 2018. Let me take a
19 step back and talk a little bit very briefly about
20 what's going to happen in the interim, between
21 2010 essentially and 2018.

22 So in 2009, facilities are going to have
23 to apply for a permit from us; and in their
24 application, they have to make a demonstration
25 that they have a reasonable chance of getting to

1 the .9 pounds per trillion Btu by 2010; or if it's
2 a lignite plant, the 2.16 pounds per trillion Btu.
3 If they do that, they can get a permit from us.
4 If they can't actually reach the .9 pounds per
5 trillion Btu or the 2.16, they can apply for an
6 alternate emission limit, AEL.

7 The alternate emission limit would be
8 reassessed in 2015. We set the bar higher for
9 what it takes to continue to receive an alternate
10 emission limit. And then of course, the alternate
11 emission limit option goes away with our hard cap
12 in 2018. So that's a temporary measure, as the
13 plants gear up to meet this hard cap that we're
14 proposing at this point for 2018.

15 Now, I want to say a couple words about
16 cap and trade, and I think this is the most
17 controversial, probably the most misunderstood
18 aspect of our proposal. A little bit of
19 background quickly here.

20 Each state is granted so many pounds of
21 mercury emissions. It's called a mercury budget.
22 This was granted by the federal government. So
23 each state allocates this budget to the mercury
24 sources that are located within the boundaries of
25 the state. These allocations to go to individual

1 sources are what we refer to as credits, mercury
2 credits.

3 Selling credits, as far as we can tell,
4 no problem with selling credits. If a plant emits
5 less than its credit allocation, it can sell its
6 excess mercury credits wherever it can, to other
7 facilities that can't or don't meet that. They
8 can sell these credits from 2010 on into the
9 future, and there is a big financial incentive for
10 plants to emit less mercury, because mercury
11 credits are going to be very expensive.

12 And so there is a financial incentive to
13 emit less mercury, because they'll have mercury
14 credits for sale; and so hopefully this aspect of
15 the plan could result in sources emitting less
16 than the standard. That was the point of the
17 selling aspect of the credits.

18 The controversy over cap and trade, what
19 we've heard in the testimony, what we've heard in
20 the hearing, has to do more with buying credits
21 than selling credits. I think that's where most
22 of the controversy comes in.

23 The federal government's plan is that if
24 a plant exceeds its allocation of mercury credits,
25 no problem, they can just buy credits and continue

1 pumping out as much as mercury as it wants to or
2 as it can afford. We don't like that approach at
3 the Department. We disagree with that approach.
4 We don't think it's protective enough of the
5 health and environment in the state, and that's
6 not what we're advocating. Our plan will not
7 allow unlimited buying of mercury credits after
8 2018. We have some restrictions on what it would
9 do in the interim, too.

10 So here is how the cap and trade would
11 play out during this transition period from 2010
12 to 2018. Now remember, each facility is given a
13 specific mercury allocation. Some facilities, as
14 I said earlier, may be given an alternate emission
15 limit between 2010 and 2018, during that period,
16 that would be revisited halfway in between those
17 two, roughly halfway in between those two. But
18 some plants may have this alternate emission
19 limit. That's going to allow the facilities to
20 put out somewhat more mercury than its allocation
21 grants it. There is a difference between that.

22 Now, our proposal would allow plants to
23 buy mercury credits between their allocation and
24 what their alternate emission limit grants them.
25 They could buy enough credits to continue to

1 operate up to their alternative emission limit.
2 If they go over that, it's an air quality
3 violation. They can't buy their way out of that
4 in the interim, but they can reach their alternate
5 emission limit by buying additional credits, even
6 if they exceed what was allocated to them
7 originally.

8 Do people understand that point? It's a
9 difficult one, but an important one.

10 CHAIRMAN RUSSELL: Richard, before we go
11 on, the alternate emission limit, you mentioned
12 between 2010 and 2018 only?

13 MR. OPPER: Yes.

14 CHAIRMAN RUSSELL: No AEL's after 2018?

15 MR. OPPER: No alternate emission limits
16 after 2018, according to our existing proposal
17 right now, that's our recommendation; because in
18 2018, the .9 pounds per trillion Btu or 2.16
19 pounds per trillion Btu for lignite facilities
20 becomes the hard standard.

21 CHAIRMAN RUSSELL: On the lignite, which
22 is a higher standard, will there be a cap on how
23 much Btu they can put out?

24 MR. OPPER: Well, there is a cap on the
25 pounds of mercury it can emit per trillion Btu it

1 puts out.

2 CHAIRMAN RUSSELL: Why would we allow
3 them to increase their amount of energy production
4 and increase the amount of mercury that we put
5 into Montana?

6 MR. OPPER: Are you asking if one of the
7 unintended consequences perhaps of our
8 recommendations would be to encourage the burning
9 of more lignite, as opposed to burning of more
10 subbituminous? Is that what you're asking?

11 CHAIRMAN RUSSELL: If the standard is
12 three times higher.

13 MR. LIVERS: I'm not sure I have an
14 answer for it, but I guess what you're saying is:
15 Given the fact that we use a pounds per Btu
16 methodology, if name plate capacity were increased
17 on any given plant, then by definition, the
18 emission of mercury could go up by that same
19 proportion; that's the concern, right?

20 CHAIRMAN RUSSELL: That would be my
21 concern.

22 MR. OPPER: Well, again, keep in mind:
23 Overarching this whole issue is the fact that we
24 do have this 298 pound cap that is sitting on the
25 state now. I'll talk about this in a minute.

1 That could ultimately be exceeded, but it's going
2 to be pretty expensive to do so.

3 CHAIRMAN RUSSELL: It still concerns me
4 that we have a coal out there that we're going to
5 allow to burn at three times the amount of mercury
6 per the same energy unit that subbituminous does.
7 So basically are we encouraging the generation of
8 that, because the cost per unit is going to be
9 cheaper?

10 MR. OPPER: Mr. Chair, that kind of goes
11 back to my point --

12 CHAIRMAN RUSSELL: Don, do you have a
13 question?

14 MR. MARBLE: I seem to recall testimony
15 from the hearing saying that it is a problem for
16 existing plants burning lignite, but for new
17 plants that are going to come on line, the new
18 technology, lignite plants will be able to meet
19 the .9 pound, and that technology is available.
20 So are you just talking about existing plants --
21 which I guess there's one or two -- or are you
22 talking about new plants that want to come on and
23 burn lignite?

24 MR. OPPER: Mr. Chairman, Mr. Marble, we
25 were talking about new plants as well as existing

1 plants. But I would guess --

2 MR. MARBLE: That's what I remember from
3 the hearing that --

4 MR. OPPER: I would guess in the
5 hearing, you also heard from other potential
6 lignite sources that --

7 MR. MARBLE: From both sides.

8 MS. SHROPSHIRE: Actually both sides
9 showed data in charts that they can meet .9.

10 MR. OPPER: With perfect clarity, both
11 sides indicated that you can and cannot --

12 CHAIRMAN RUSSELL: One at a time, and
13 we'll get through this. Any other questions
14 before Richard continues?

15 MR. OPPER: Getting close. Again, after
16 2018 -- Let's see. We were talking about the
17 transition period. And to answer, I think, the
18 Chairman's question, after 2018, those caps become
19 hard. If a plant -- plants that bust the
20 standard, we'll bust, because they'll be guilty of
21 an air quality violation. They can't get an
22 alternate emission limit after that. They can't
23 buy their way out of that limit with the cap and
24 trade program that we are proposing.

25 So several reasons why we considered

1 including the cap and trade program. At its best,
2 it would provide financial incentive to facilities
3 to minimize their mercury emissions, because
4 they'll have credits to sell. These credits are
5 doing to be expensive, \$20,000 to \$30,000 a pound.
6 So they will be very expensive. It will provide
7 incentives for them to clean up faster, so they
8 won't have to buy credits during the transition;
9 so that's a plus we think. It will allow -- this
10 is an important one. We think it's a good tool to
11 allow some new development to come into the state.

12 New facilities are going to have to buy
13 credits every year. If a new facility coming in
14 is going to push its emissions over the 298 pound
15 cap -- If all of our existing facilities are just
16 meeting that cap, and a new facility wants to come
17 in, and its emissions are going to exceed that
18 cap, we're going to allow that facility to come
19 in, according to our recommendation.

20 We would allow that facility to come in
21 and operate in the state, but every year it
22 operates, it's going to have to buy credits that
23 will allow it to exceed the 298 pounds of total
24 emissions. It will still have to meet the
25 standard, but it can buy its way out of the 298

1 pound cap, not buy its way out of the standard.
2 So they won't be dirty plants that come into the
3 state, they'll be clean according to the standard
4 we're proposing, but the 298 pound cap, we would
5 allow to be exceeded.

6 CHAIRMAN RUSSELL: Richard, where are
7 they going to buy these credits?

8 MR. OPPER: Mr. Chairman, we talked
9 originally and our original proposals had to do
10 with buying those credits in-state first, or from
11 the state of Montana, and then looking outside of
12 the state to buy if there are no more credits
13 available.

14 Right now, we're proposing unlimited
15 purchases from Pennsylvania, or Ohio, or any other
16 facility that happened to have credits for sale.

17 CHAIRMAN RUSSELL: Some of the states
18 that were given some very high caps are going to
19 profit, and it seems like when we first started,
20 we were going to just do this within our state,
21 because if anyone is going to profit, it should be
22 the folks operating in Montana, because they're
23 paying taxes here, and will be getting the relief,
24 whether we do it in rates or in tax relief. Why
25 wouldn't we continue to look at that?

1 MR. OPPER: Well, Mr. Chairman, members
2 of the Board, that was something that the
3 Department was very interested in, because the
4 situation we wanted to avoid was a situation in
5 which our facilities exported a lot of cash out of
6 state, and imported mercury credits, the ability
7 to pollute more in state. And so we had some
8 major concerns with that. So that's why we
9 proposed the focus initially on in-state trading.

10 Now, we ran into some problems, as we
11 said, with EPA. I don't think we explained some
12 of those issues very well originally. But EPA
13 will not allow states -- If you're going to
14 participate in the EPA's cap and trade program,
15 then they won't allow the state to encourage
16 in-state trading the way we had proposed.

17 We could -- and it is an option. We
18 could opt out of the cap and trade program
19 proposed by EPA. Other states have. Montana can
20 certainly do that. And that's an option the Board
21 needs to consider. But if we want to allow new
22 facilities that come into the state to buy credits
23 from outside of the state so they can come in and
24 operate their plants, then we have to participate
25 in EPA's program.

1 CHAIRMAN RUSSELL: I guess I tend to
2 differ with that. I've watched this Board over
3 the years tell the EPA that we don't agree with
4 their position. And if the federal government set
5 the cap to protect the public's health globally,
6 then why don't we just abide by the cap and not
7 trade?

8 MR. OPPER: That's certainly an option
9 that the Board has. If we just abide by the cap,
10 and offer no trading, the consequence will be
11 reducing the potential of Montana to allow further
12 developments to come into the state; because what
13 you're asking the existing facilities to do is to
14 make enough room in that 298 pound cap by cleaning
15 up, to allow for new developments to come in.

16 Is that reasonable? We're already
17 asking them to cut down enormously. We're asking
18 them to buy technology that right now may not even
19 exist to reach that .9. So we would be asking
20 them to reduce substantially lower than that in
21 order to make more room.

22 CHAIRMAN RUSSELL: Substantially lower?
23 Because if it's .9, and they can get to .7, that's
24 25 percent, right?

25 MR. OPPER: That's a reduction. I don't

1 know how that would translate into pounds right
2 now.

3 CHAIRMAN RUSSELL: 25 percent of 300 is
4 60, right? 25 percent of 300 is 75. 75 pounds
5 per trillion Btu is a couple plants, isn't it?

6 MR. OPPER: I thought you were talking
7 about Colstrip specifically, and I didn't know
8 what the percentage of total mercury emissions
9 came from Colstrip. It's significant. It's huge.

10 But if we're talking about changing the
11 standard to allow more room for new development,
12 we're talking about Colstrip. Colstrip is a big
13 production facility generally. We can hold
14 everybody to the same standards, but the savings
15 will come from Colstrip essentially.

16 CHAIRMAN RUSSELL: If they can get to
17 .8, we can even further capitalize on our
18 resource.

19 MR. OPPER: We can.

20 CHAIRMAN RUSSELL: Since they're
21 capitalizing on our resource, and selling it to
22 someone else, why not?

23 MR. OPPER: It's a decision the Board
24 has to grapple with.

25 CHAIRMAN RUSSELL: I'm going to stop.

1 I'm sorry.

2 MR. OPPER: I'm enjoying this.

3 MS. SHROPSHIRE: Is there a limit to the
4 proximity of plants next to each other in terms of
5 geographical location?

6 MR. OPPER: Mr. Chairman, Ms.
7 Shropshire, no, we don't have proposed -- and I
8 assume where you're going with this is that it
9 could create hot spots; if we have two facilities
10 essentially adjacent to one another, that it could
11 create hot spots. That's your concern.

12 MS. SHROPSHIRE: If above .9 is dirty
13 and below .9 is clean, and you have two or three
14 plants next to each other that are .9, how is that
15 clean?

16 MR. OPPER: Well, if you had two
17 adjacent to each other that were .9, it would
18 still be cleaner than it is now because we're
19 requiring a reduction. But I understand your
20 point. And if we do concentrate the impacts,
21 concentrate the plants, we're going to concentrate
22 potentially the impacts. So I can't disagree with
23 where you're going with this.

24 MS. SHROPSHIRE: And I guess I'm still
25 confused, because you're giving us, I think, a new

1 proposal, but maybe --

2 MR. OPPER: No, I don't believe I am.

3 MS. SHROPSHIRE: It's the same as
4 before?

5 MR. OPPER: This is the same one that we
6 had when we came to the last meeting.

7 MS. SHROPSHIRE: So what you're
8 proposing there is no cap on the 298?

9 MR. OPPER: No, the 298 cap can be
10 exceeded under our recommendations.

11 MS. SHROPSHIRE: By how much?

12 MR. OPPER: By as much as new companies
13 coming into the state are willing and can afford.

14 MR. MARBLE: What happens about people
15 that are trying to get a permit now, and they're
16 trying to build a plant between now and 2010?
17 What do you propose?

18 MR. OPPER: Mr. Chairman, Mr. Marble,
19 those plants will be able to -- they will have to
20 abide by the conditions of the permit. However,
21 once a rule is adopted and in place, that rule
22 will apply also to the facility, so --

23 MR. MARBLE: But what are you proposing
24 for a standard from starting now?

25 MR. OPPER: Starting now, in 2010, our

1 standard is .9 with the ability to apply for an
2 alternate emission limit; and if they do get an
3 alternate emission limit, that's revisited in
4 2015, and in 2018 that goes away. So they would
5 have to meet the .9.

6 MR. MARBLE: At the hearing, I thought I
7 heard people say that they can reach .9, or very
8 close to it now. It seems to me if we're worried
9 -- and I'm worried about future development, and
10 future plants, and leaving the door open to them
11 -- why wouldn't we require the very best
12 technology now to save as much of that hard cap or
13 the 298 for future plants? And why wouldn't you
14 start right now and say, "Everybody that wants to
15 build a plant has to meet the best standard," and
16 as the standards improve, if you can change --

17 That way, we keep the door open for new
18 plants instead of saying to them, "You're just
19 going to have to buy your way into the system." I
20 don't think that's fair. Plus I don't think caps
21 are any good either, I mean the cap and trade are
22 any good. Why not require .9 now?

23 MR. OPPER: Well, Mr. Chairman, Mr.
24 Marble, you also heard at the hearings that a
25 standard of .9 right now will interfere with and

1 probably preclude financing new facilities.

2 MR. MARBLE: I didn't hear that.

3 MR. OPPER: That was stated by Southern
4 Montana Electric.

5 MR. MARBLE: No. They said they would
6 be willing to install ACI.

7 MR. OPPER: Yes, they did, and I'm sure
8 they will. But they also testified pretty clearly
9 in Great Falls that they won't be able to finance
10 the plant because they can't guarantee they can
11 reach the .9 pounds per trillion.

12 MR. MARBLE: Like at Hardin, there was
13 an alternative plant, or alternative permit
14 proposal. I'm assuming that would be available,
15 they would, too, if they install the best
16 available technologies now, which sounds like
17 close to nine, they don't quite meet it, then
18 there would be an alternative permit procedure to
19 give them some time.

20 MR. OPPER: Which is certainly built
21 into our transition period from 2010 to 2018.

22 MR. MARBLE: But I don't understand why
23 you don't require people building plants now to
24 use the best available technology.

25 CHAIRMAN RUSSELL: I know this is on

1 Robin's thoughts, too, but Tom.

2 MR. LIVERS: Mr. Chairman, Mr. Marble,
3 I'm wondering if at some point, either now or
4 during our subsequent explanation, a discussion of
5 how BACT comes into play might address your
6 question.

7 MR. MARBLE: Okay.

8 MR. OPPER: Okay. Thank you. Again,
9 I'm almost done. I guess the point is: Yes, the
10 298 pound cap can be exceeded under our current
11 recommendations. And so I understand your
12 concerns, and I think you make a good point, Ms.
13 Shropshire, about how the concentration of plants
14 could have localized plants that might be severe.

15 MS. SHROPSHIRE: If essentially we have
16 no cap, and there is no restriction on how many
17 plants can go next to each other, why would you
18 even have .9?

19 MR. OPPER: Because it would certainly
20 have an impact. It would require facilities to
21 have a serious reduction in mercury control. No
22 plant could exceed that after 2018.

23 MS. SHROPSHIRE: But for an individual
24 plant. For Montana it doesn't make a difference.
25 For Montana, it doesn't make Montana safer.

1 CHAIRMAN RUSSELL: Richard, what's the
2 difference between two plants being colocated, and
3 one plant producing the same as two plants?

4 MR. OPPER: Right now, one plant is
5 producing as the same as three or four plants.

6 CHAIRMAN RUSSELL: So it doesn't matter.
7 It's still a hard standard, whether it be a plant
8 that does 100 units, or a plant that does ten
9 units. That's the issue that I bring up, the same
10 logic about Sidney. Sidney has three times the
11 mercury emission standard that Colstrip will have.
12 Do we want Sidney to be producing the same amount
13 of Btu's as Colstrip? They're going to be able to
14 churn out three times as much mercury.

15 MR. ROSSBACH: Except that, as I
16 understand it, they will have a credit assigned to
17 them, which will limit how much additional Btu
18 they can do.

19 CHAIRMAN RUSSELL: No. We have a cap in
20 Montana.

21 MR. ROSSBACH: But each one of them is
22 going to be assigned a credit -- isn't that what
23 you said -- to start?

24 MR. OPPER: Mr. Chairman, Mr. Rossbach,
25 that's true. It will be assigned a credit, it

1 will be assigned an allocation; but its allocation
2 per Btu would be bigger than a facility that did
3 not use it.

4 MR. ROSSBACH: I understand that, but
5 they will have an allocation that for them to
6 increase their Btu, they're going to have go back
7 to the Department to do that, and there won't be
8 any allocation available to them.

9 CHAIRMAN RUSSELL: At the cap in 2018.

10 MR. ROSSBACH: Right.

11 CHAIRMAN RUSSELL: Heidi, do you have a
12 question?

13 MS. KAISER: It goes back to -- I don't
14 think these facilities can just start cranking out
15 more Btu's. I'm not sure how they're permitted,
16 but I would guess they thought a limit or range of
17 Btu's, and also the coal that they can process.

18 CHAIRMAN RUSSELL: The overarching issue
19 is here the concept of how many pounds of mercury
20 do we want to put into a specific area, and that's
21 the only reason I bring that back up. The logic
22 of cap and trade says this is just a global issue.
23 Cap and trade. The federal government said cap
24 and trade is a global issue, it's not a local
25 issue.

1 We've heard testimony that this is a
2 local issue. Robin's points are, "Boy, if we're
3 churning out this much electricity at .9, are we
4 creating a localized public health impact that's
5 not addressed in the federal cap and trade rule?"

6 And I think when I bring up the Sidney
7 issue, when Robin brings up, "What if we had two
8 plants, and we're going to have twice as much
9 mercury emitted?," it's a budget. Basically just
10 it's a budget of mercury. And the federal
11 government said the budget is a global issue, not
12 a local issue.

13 And that's the only point I bring up as
14 I bring up this issue about Sidney, or -- it
15 doesn't matter if it's two plants or one plant
16 churning out twice as much energy.

17 MS. SHROPSHIRE: And I think maybe the
18 federal government isn't even in agreement,
19 because I think EPA has come out with some studies
20 that show that there is local deposition.

21 MR. OPPER: Unpublished, which may or
22 may not result in censorship. Those EPA studies
23 aren't officially published yet, probably because
24 of political considerations, but who knows. But
25 they're not published yet. And that doesn't

1 necessarily reduce their validity.

2 I think I said this once before to some
3 Board members, but there is clear and convincing
4 evidence that mercury is a global pollutant, and
5 yet there is clear and convincing evidence that
6 it's deposited locally. There has been a lot of
7 studies on both sides. The jury is out. But I
8 think more and more, we're seeing studies that
9 indicate that it is deposited locally, and the
10 Department is actually basing its mercury rule on
11 that assumption.

12 CHAIRMAN RUSSELL: On what assumption?

13 MR. OPPER: The assumption that it is
14 deposited locally.

15 CHAIRMAN RUSSELL: Also.

16 MR. OPPER: Yes. So there will be --
17 Mr. Chairman, there would be members of the
18 audience that would disagree with this, but my
19 point here really is not so much to advocate the
20 Department's position. It's try to explain it,
21 and to try to answer questions as best I can.

22 There are some great issues that have
23 come up that the Department needs to grapple with:
24 Should we grant a higher limit for lignite
25 facilities? Should the 298 pound cap be able to

1 be exceeded by buying credits, additional mercury
2 credits? These are legitimate issues for the
3 Board to grapple with. Is it the right thing to
4 do to have a hard standard of .9 parts per billion
5 Btu, or might that actually be too restrictive of
6 new development?

7 What if Colstrip can't meet it, despite
8 everything it does? What are the consequences of
9 that? What are the impacts of a hard cap on
10 financing for new facilities? These are issues
11 the Board has to discuss on its own.

12 And again, I'm here to explain the
13 Department's position, to try to answer questions,
14 and hopefully to provide some clarification, so
15 you know what the recommendation is, not
16 necessarily at this point to advocate for it.

17 And I think the only other point I
18 wanted to bring up here relative to the mercury
19 is: Based on some of the testimony we heard at
20 the hearings, we have contacted our sister state
21 agencies' Department of Health and Human Services,
22 and we are jointly trying to come up with a study
23 designed and funding for a study to see if we can
24 test hair samples of people that are next to power
25 plants, coal fired power plants, downwind from

1 power plants, to see what those mercury levels
2 might be in some of the people who are exposed to
3 these, as compared to people who aren't.

4 So we working with DPHHS now to try to
5 fund such a study, and we think that will be
6 fascinating results, so we want to let people know
7 we're responsive to that. That's all I had.

8 CHAIRMAN RUSSELL: I have a question,
9 and you might want to defer it. I'm still having
10 a lot of trouble thinking that we're going to
11 trade with other states. And if we were to just
12 keep it in the house, how much mercury at .9, if
13 everyone is complying with what's in the pipeline,
14 and what's operating, are we like 296? Is it
15 right there, right? There is like --

16 MR. OPPER: That's under the assumption
17 that every plant is operating at full capacity,
18 and that a plant the size of the Roundup facility
19 that has been proposed is operating, as is
20 Southern Montana Electric.

21 CHAIRMAN RUSSELL: What is the
22 percentage --

23 MR. ROSSBACH: Hardin also?

24 MR. OPPER: And Hardin also.

25 MR. ROSSBACH: I guess my question was:

1 Are you classifying Hardin as an existing
2 facility? I understood that we're still in the
3 process of the settlement agreement with the
4 institution of the new control technology, and I
5 just wanted to make sure if it was considered an
6 existing facility or not.

7 MR. OPPER: Mr. Chairman, Mr. Rossbach,
8 whether or not we label it as existing or not,
9 it's included in our calculations.

10 CHAIRMAN RUSSELL: But Tom just said to
11 me, and that does not include SME's plant in Great
12 Falls.

13 MR. LIVERS: No, Great Northern.

14 CHAIRMAN RUSSELL: Great Northern.
15 Okay. So how much of that budget does Colstrip
16 eat up?

17 MR. OPPER: I would say probably 70
18 percent. That's just a guess.

19 CHAIRMAN RUSSELL: I'm not picking on
20 Colstrip, but there is some logic here.

21 MR. OPPER: It's obviously the major
22 producer of both power and mercury in the state.
23 55 or 60 percent.

24 CHAIRMAN RUSSELL: That's lower than I
25 expected.

1 MR. OPPER: Me, too. I thought it would
2 be higher. 55 to 60 percent. Ms. Skibicki is
3 doing the math as we speak.

4 CHAIRMAN RUSSELL: 60 percent?

5 MS. SKIBICKI: Yes, roughly.

6 MR. OPPER: Roughly colstrip will
7 produce roughly 180 pounds of the 298 pound cap.
8 And the question: What is the percentage -- if I
9 may ask my staff -- what is the percentage of the
10 total mercury emissions it's putting out now, with
11 everything that is in operation? Do we have that
12 information?

13 MS. SKIBICKI: I would say probably even
14 higher than that.

15 MR. OPPER: Higher than the 60 percent?

16 MS. SKIBICKI: Yes.

17 MS. HEDGES: They're at 800, and TRI is
18 1050.

19 MR. OPPER: I'll put it on the record.
20 Right now, Colstrip puts out roughly 80 or a
21 little bit higher percentage of the total mercury
22 emissions in the state.

23 MS. SHROPSHIRE: If Colstrip were to use
24 Best Available Control Technologies, how many
25 pounds per trillion Btu -- where would they be?

1 MR. OPPER: Right now, to put it in the
2 Best Available Control Technology, right now,
3 Colstrip has done quite a bit of testing of
4 materials. They've done injection of silicone
5 materials, I believe. Colstrip has done some
6 testing with some limited mercury control
7 technology that it could reasonably install in its
8 facility right now. I think they're getting
9 anywhere from 40 to maximum? Not that high? 30?
10 Do I hear 40?

11 MS. SHROPSHIRE: Is that Best Available
12 Control Technology, what you're talking about now?

13 MR. OPPER: No, it's not, and it's
14 speculation as to what Best Available Control
15 Technology would give -- what kind of control it
16 would give. Right now, Best Available Control
17 Technology may involve some kind of activated
18 carbon injection, the carbon being infused with
19 chloride or brominating agents that would make it
20 more effective.

21 And Colstrip, as we know from the tour
22 we had there, has some design limitations that
23 make it difficult to do that. So it's a hard
24 thing to test right now. So it's speculation as
25 to what Best Available Control Technology might do

1 for Colstrip.

2 MS. SHROPSHIRE: I'm just thinking in
3 terms of Best Available Control Technologies in
4 the United States. What other plants are
5 achieving it?

6 MR. LIVERS: Mr. Chairman, I wonder if
7 this might be a good time to kind of shift gears
8 here, because one of the issues, one of the
9 subissues of mercury that we wanted to cover as we
10 walked through this, was Best Available Control
11 Technology, and I think we might be able to better
12 address some of the questions in that presentation
13 and discussion.

14 MS. SHROPSHIRE: I guess what I'm
15 thinking is that in terms of logic, we have heard
16 from the Department that local deposition may be
17 occurring. I think people agree -- at least we
18 heard testimony -- that mercury is bad for you,
19 which is why we're talking about it. And we also
20 would like for Montana to have room for more
21 energy development. Why would we agree to permit
22 a plant that couldn't do better?

23 MR. OPPER: Well, as Mr. Livers says, we
24 are going to be talking about Best Available
25 Control Technology, and --

1 MS. SHROPSHIRE: So if we look at the
2 best plants in the nation, and from testimony I've
3 seen -- and I'm arguing, I'm saying the best --
4 but anywhere from plants that are achieving, that
5 actually have permits for .2, if we use that as
6 logic, how much more generation -- we've got room
7 for more generation in the state, a lot more. And
8 so I think we're shooting ourselves in the foot by
9 not looking at having this discussion, because I
10 think it opens up the door to lots more
11 development if we look at that. I think it's a
12 really important question.

13 MR. OPPER: It is an important question.
14 Again, my job here today is not to advocate the
15 Department's position. We also grappled in coming
16 up with our rule with the question of, "How do we
17 get good controls that would be protective of the
18 public health, and yet allow more room for
19 development?"

20 We said that a limited cap and trade
21 program probably would be the most effective way
22 to do that. The other option, of course, is
23 forcing more and more controls on the existing
24 facilities to make room for development. And
25 that's a question the Board will have to grapple

1 with.

2 Before I step down, I want to know if
3 there are other questions that people are still
4 unclear about the Department's position. Mr.
5 Skunkcap.

6 MR. SKUNKCAP: What is the percentage of
7 power that goes to Montana, and management,
8 ownership? Do they live in Montana, or out -- the
9 ones that are making decisions for the mercury
10 output?

11 MR. OPPER: Mr. Chairman, Mr. Skunkcap,
12 it's my understanding -- we are a net exporter of
13 electricity in the state, and I think we consume
14 in-state roughly half of what we produce. Is that
15 more or less accurate? I'm getting a definite
16 shrug on the part of my staff. So I can say with
17 utter lack of certainty that we export an amount
18 about equal to what we consume in the state.

19 MR. SKUNKCAP: 50 percent then?

20 MR. OPPER: Yes.

21 MR. SKUNKCAP: As far as the management,
22 are the owners that are making the decisions, do
23 they live in Montana?

24 MR. OPPER: Mr. Chairman, Mr. Skunkcap,
25 if I understand the process correctly, we're going

1 to be making the decisions. We're going to be
2 making a recommendation to the Board, and the
3 Board is going to be making the decisions.

4 MR. SKUNKCAP: At the plant.

5 MR. OPPER: Facilities on how it's going
6 to go about meeting whatever rule we come up with?
7 There is some in-state management, some
8 out-of-state management; some of the funds stay
9 in-state, and some go outside the state. I think
10 I understand what you're asking, which I believe
11 is: Are the people that are going to be making
12 the decisions have a vested interest in this state
13 than the people who live here? Are they going to
14 be protective of our interests? Of course, if you
15 have a dog in the fight by living here, you're
16 going to be more committed to making decisions
17 that are protective of the environment. Is that
18 your --

19 MR. SKUNKCAP: Yes. So you're saying
20 that the people are out of state?

21 MR. OPPER: Some of them are. Certainly
22 PPL has management in-state. But yes, their
23 corporate facilities are not in state. And there
24 has been a major change. Our Legislature enabled
25 Montana Power Company, a home grown power

1 producing distributing company, to be sold to
2 out-of-state interests. That was a policy
3 decision that was made by the Legislature, and we
4 don't have any control over that.

5 Any other questions about the
6 Department's position before I turn it over?

7 CHAIRMAN RUSSELL: I don't think so.
8 Thanks, Richard. I guess anything else will be
9 brief, and we'll just ask questions. I know Robin
10 has mentioned BACT a few times, and Tom brought it
11 up, and I know the Department wants to talk about
12 the BACT process; and maybe if we can emphasize
13 that, and de-emphasize some of the other stuff.
14 We've already heard that Richard so eloquently
15 answered questions to, because Ann probably
16 doesn't want to speak if we keep to the topic.

17 MR. LIVERS: Mr. Chairman, I guess I'd
18 just again go through the purposes of this
19 discussion, is to give the Board a chance to make
20 sure there is common understanding, questions are
21 answered, but also among yourselves a chance to
22 discuss this. So we're open. We've tried to come
23 up with a format that we think will fairly
24 expeditiously get through that, but if we're
25 missing the mark, let us know. If you want us to

1 condense, and allow more time for discussion, we
2 can certainly do that as well.

3 CHAIRMAN RUSSELL: I think condense will
4 be good.

5 MR. HOMER: Mr. Chairman, members of the
6 Board, echoing what Tom said. My name is Chuck
7 Homer. I'm with the Air Resources Management
8 Bureau for the record.

9 Our goal for this part of the
10 presentation was to merely describe to the Board
11 where we are at at this point in reviewing
12 comments. The Department's job, as your staff, is
13 to not only provide you with the raw comments on
14 this rule, but to provide you with a summary that
15 you can use in drafting your responses.

16 And when you take final action, what we
17 will do after that is we will write up the notice
18 with the rule as you describe, and the responses
19 to all those comments that conform to the rule
20 that you've decided. So I wanted to just quickly
21 go through some of the questions that are -- and
22 as a very preliminary review have turned up. And
23 again, if I'm taking too much time, if I'm going
24 too slow, just give me the high sign.

25 Two main issues: Control requirements

1 and trading. Under control, what we're hearing
2 are comments on both sides. The questions are:
3 Is it appropriate to even have mercury control in
4 all facilities? Are mercury emission limits
5 appropriate, the ones that noted, .9, 2.16?

6 The kind of comments we're hearing on
7 either side of that is: Are they too stringent?
8 Do they allow for financing of new plants? Are
9 they stringent enough? Do they protect public
10 health? Are they similar to what BACT would
11 require?

12 Secondly, are percent control
13 efficiencies more appropriate, more or less
14 equitable than a hard number? Should there be
15 only a control equipment requirement, and not a
16 numeric limit, what has been referred to as the
17 "soft landing," or as the permit that was issued
18 to the Hardin facility. That's where you just
19 say, "You put on these types of control, and we
20 don't give you a number."

21 And this is some of the discussion
22 that's already taken place. Should there be
23 distinctions? Should there be a subbituminous
24 limit and a lignite limit? Different limits for
25 old and new? And then again, when should these

1 requirements go into effect? 2010, 2015, 2018?

2 Alternative emission limits are
3 generally part of any discussion of any of the
4 comments having to do with control limits. Should
5 these AEL's be available? Should they be posed on
6 existing and currently in process EGU's? Those
7 kinds of issues. Should the AEL's have upper
8 limits? Should we say, "Try to meet .9. If you
9 can't, you can meet something else, but nothing
10 above a certain limit."

11 What schedule should the review be on?
12 Three years, four years, ten years? There has to
13 be some if you establish it, and want to look at
14 that, look at what kind of review timing you think
15 is appropriate. Again, ending times. If you get
16 an alternative limit, what is the kind of test you
17 want to do? Do you want to do different tests at
18 different times? Do they end in 2015 or do they
19 end in 2018? Do you have soft landings where they
20 can go on indefinitely?

21 And then trading. Should it be allowed?
22 Should it not be allowed? Should it be limited?
23 Should there be in-state trading? Should there be
24 full state trading for a period of time, and then
25 it's over? What is the appropriate allowance?

1 Giving allowances at your emission limit; at your
2 alternative limit; giving more to new sources;
3 more to proposed sources; saving allowances for
4 new generation; or retiring allowances. Those are
5 the questions that the Board is going to have to
6 address.

7 A couple of things that we have seen as
8 areas requiring clarification. There are some
9 areas that we have seen in the comments that we
10 believe require some clarification. We've got a
11 lot of comments on whether or not trading can be
12 used to exceed the emission limits. If you apply,
13 if the Board applies a standard, be it .9 or 2.16
14 or whatever, and if the Board in addition to that
15 allows trading, can you use that to exceed those
16 limits?

17 The answer is no. Whatever limit you
18 impose, whether it's .9, alternative allowances
19 have nothing to do with the facility complying
20 with that.

21 And the next question has to do with
22 what is required if the Board does not have to --
23 What is the ultimate requirement for submitting a
24 plan under CAMR? If the Board chooses, for
25 example, to have trading, will that comply with

1 the requirements under CAMR? Absolutely. If the
2 Board does it unrestricted, that's what EPA has
3 said is an automatically approvable plan.

4 If the Board chooses to apply a trading
5 scheme that has restrictions, either incentives or
6 requirements to trade in the state, EPA has said
7 in several venues that that is not approvable.

8 I know there was discussions in the
9 comments as to whether or not that is real,
10 whether or not they can impose their policy,
11 whether or not the rule itself was adopted
12 legally. All those are part of the comments, and
13 the Board will consider those. All I can give the
14 Board is an assessment of risk.

15 If the Board chooses to adopt a program
16 that is not approvable, then what the Board is
17 risking is that the EPA will then impose its own
18 program on top of whatever the Board does. EPA
19 does have that authority. So the Board can
20 establish whatever rule it wants. EPA is the
21 ultimate decider of what program is approvable or
22 not. I can't tell you what your action will
23 create there.

24 CHAIRMAN RUSSELL: Do you have that in
25 writing?

1 MR. HOMER: Mr. Chairman, what I have in
2 writing is an email from a Clean Air Markets
3 Division staffer saying that it's EPA's policy not
4 to allow programs that inhibit free trading of
5 credits. It's not something you could take to
6 court. All I can do is tell you what I believe
7 you are risking if you do that. I don't know
8 whether they can enforce what they've told us or
9 not.

10 CHAIRMAN RUSSELL: Wouldn't it be nice
11 if as we deliberate on this in September, that
12 they show up and tell us that they won't approve
13 it? Let's get one of them in front of us and tell
14 us they won't approve it.

15 MR. LIVERS: Mr. Chairman, we can
16 certainly make that request, and we'll do that.

17 CHAIRMAN RUSSELL: Please do.

18 MR. LIVERS: We'll convey that to EPA.
19 I guess just weighing in, the Department has never
20 been overly shy about challenging EPA, and the
21 Board even less so. Maybe my personal take on
22 this is the added risk here is that there is a
23 default position out there, a default rule that
24 you kick in if they don't approve it, and it's a
25 pretty easy thing to invoke. So personal opinion.

1 CHAIRMAN RUSSELL: And also it's only
2 CAMR. We just took care of a bunch of adoption by
3 reference that excluded it, so if they came in,
4 they would only be doing CAMR.

5 MR. HOMER: Mr. Chairman, that's true.
6 If EPA determines our -- Well, that's probably
7 true. If they determine our program is
8 inadequate, I would guess they would put in just
9 unrestricted cap and trade.

10 CHAIRMAN RUSSELL: If they did anything
11 more, it would seem punitive, wouldn't it? You
12 don't have to answer that question.

13 MR. HOMER: Mr. Chairman, that's all of
14 the specifics I had to go through. I can go into
15 a discussion of BACT now, or I could answer
16 questions that the Board would wish to direct to
17 me.

18 MR. MARBLE: I would like to hear from
19 the Department as to what do they consider Best
20 Available Technology now. At the hearing, we
21 heard different people testifying as to what's
22 reachable, and it's changing very rapidly, what
23 can be done. And so I would just wonder what the
24 Department's current view is on, for example,
25 Great Falls, what could be Best Available

1 Technology in Great Falls? Forget about they
2 don't want to spend the money, but is that okay?

3 MR. HOMER: Mr. Chairman, Mr. Marble,
4 Best Available Control Technology is a process.
5 There is no answer to what BACT is. It is a
6 process that's embodied in rule, and has existed
7 for 30 years. There is a mountain of policy, and
8 guidance, and court decisions that influence how
9 BACT is applied.

10 BACT is in essence a determination
11 that's based solely on a case-by-case analysis.
12 You look at the specific facility, its specific
13 structure; you look at the location; you look at
14 it on the day the application was submitted.

15 I can tell you that the draft permit
16 that was issued for SME has a limit of 1.5 pounds
17 per trillion Btu, and that was BACT on the day
18 that that draft was issued. But I can't tell you
19 what BACT would be for any other facility, in a
20 different place, at a different time.

21 There are many different standards that
22 EPA uses to put on control. We talk about BACT,
23 but that isn't the best control. That's not the
24 lowest level of emissions. A standard that
25 applies in non-attainment areas is called LAER,

1 the Lowest Achievable Emission Rate. That's not
2 even the lowest. There are obviously caveats.
3 You get into environmental factors, and you look
4 at economic factors.

5 And so again, we have things, RACT,
6 GACT, MACT. There is a million different
7 standards, and they're all kind of processes. So
8 when we're talking about this, what we're talking
9 about is not only a standard like .9, or whatever
10 the Board chooses when they make a decision,
11 that's a limit that you believe is appropriate,
12 and you have some belief that facilities can
13 comply with that, or you have outs that they can
14 use. That's just as an appropriate way of doing a
15 standard as BACT, and BACT again is just as
16 appropriate as that.

17 MR. MARBLE: So we could adopt one or
18 the other, and we'd say .9 would be the standard,
19 and that we wouldn't use the term BACT.

20 MR. HOMER: The Board has the option to
21 do both. BACT applies regardless. And kind of
22 going back to one of your earlier questions, what
23 happens right now is a facility that gets a permit
24 now will have a BACT determination done at the
25 time they have their permit. If the Board passes

1 a rule, for example, has a .9 limit in 2010, that
2 rule would apply to them also. They would have to
3 come in with a permit amendment in 2009, comply
4 with the .9, and comply with BACT at that time.

5 Eventually as control matures, this .9
6 won't mean anything. BACT will be the controlling
7 factor, and we'll come in and we'll issue a permit
8 and they'll have to comply with .9, BACT will be
9 .5 at some point.

10 MR. MARBLE: What if we adopt the rule
11 that says starting now, new plants will have to
12 meet a .9 standard. Could Great Falls, with
13 activated carbon injection and the new technique,
14 could they meet .9?

15 MR. HOMER: That is a determination that
16 would have to be made. If you put an AEL in that
17 says they have to try to meet .9, and they can get
18 an alternate limit, certainly. What you're saying
19 is that they have to -- they would get at least at
20 some interim time something that they could meet.
21 I can't today guarantee you that in 2018, every
22 facility will meet .9. I know that they can. I
23 have seen studies from bench scale to trial scale
24 that indicate if you put on appropriate control,
25 that you can do much better than .9. But it's the

1 Board's job to find that line that they want to
2 draw.

3 MR. LIVERS: Mr. Chairman, Mr. Marble,
4 and Chuck, I think we're answering from a process
5 standpoint; and if I'm hearing you right, your
6 question is more what's technically possible; am I
7 correct?

8 MR. MARBLE: Yes.

9 MR. LIVERS: I'm wondering if that might
10 be better directed toward Dave.

11 MR. KLEMP: Mr. Chairman, members of the
12 Board, for the record, my name is David Klemp.
13 I'm the Air Permitting Program Manager for the
14 Department. Thanks, Tom. I was trying to keep my
15 head down, but I obviously looked up at the wrong
16 time.

17 Mr. Marble, certainly what is
18 technically achievable is a question to us today.
19 Using Southern Montana Electric as an example,
20 they do have some short term tests that show they
21 can come in at roughly .043, I believe, were the
22 numbers. Excuse me. .43, not .043. Those were
23 short term tests. They were done over a period of
24 I believe a month. And so that's the concern, is:
25 Are they able to achieve that over the long term

1 basis?

2 And when we establish a BACT, Best
3 Available Control Technology emission limit, when
4 it applies to a facility -- because I think at
5 some point I'm going to try to make it clear when
6 it applies, and what process we need to follow.
7 We need to make sure that something is absolutely
8 technically achievable. Otherwise it is not BACT.

9 So at this point in time, when we made
10 the determination for Southern Montana Electric,
11 unless we hear otherwise -- because I need to back
12 up.

13 We are in the middle of a public comment
14 period for that facility. As we are with any
15 facility that goes through BACT, the Department
16 will make its attempt at a determination as to
17 what is technically achievable, environmentally
18 beneficial, and economically practical. We will
19 then put that up for public comment, and obviously
20 if there is something that sways our decision one
21 way or the other, we will incorporate that as
22 appropriate.

23 But at the time we made that decision,
24 we made the determination that .9 was pushing the
25 envelope a little too much for our comfort in the

1 BACT process. We were very comfortable with the
2 1.5 or the 90 percent that we put in there. The
3 company had wanted 80 percent or two pounds per
4 trillion, and so we weren't comfortable with that.
5 We thought that was a little too high. But I
6 believe it is technically achievable, but whether
7 or not it satisfies our requirements in BACT,
8 that's a different question, which will certainly
9 evolve in the future.

10 MR. MARBLE: I guess I understand what
11 you're talking about as far as BACT and the
12 process and all that. The thing about it to me is
13 as a Board, we should be thinking about protecting
14 the people around Great Falls, and it's agreed, I
15 think pretty much, and the Department said in
16 their thing, that there is hot spots, there is
17 local deposition. We should be going for the best
18 possible removal of system and rules of mercury,
19 and apparently that ACI would get it up to close
20 to .9, and the permit doesn't require that.

21 And another thing that bothers me. If
22 we don't require SME and all of the other people
23 to take as much mercury out as possible, what that
24 means is we're using more of the cap, so that the
25 Circle people when they come in, "Well, too bad.

1 We've let Great Falls get a bigger hunk of the
2 pie, and you're going to have to buy your own
3 caps." And so every time we permit a new plant,
4 we need to make sure that it's the best possible
5 technology, so that we preserve as much of that
6 cap as possible for the new plants. We want to
7 see some new plants, I suppose some people do.
8 And if we use up all of it now, we don't have any
9 down the road.

10 So I have a problem why we're not
11 requiring, not BACT, but a technologically
12 achievable limit in Great Falls. And the company
13 told us at the hearings they would install ACI,
14 and so I thought, "Well, fine. That will be close
15 to .9," and what you say, we have an alternative
16 type of permit.

17 So I don't know why that's not
18 happening, and preserving as much of this cap as
19 possible for the people at Circle, for example.
20 And they've been told, "Well, if you don't adopt
21 the --" I'm getting letters from them, and they
22 say, "If you don't adopt the Bush cap and trade
23 program, then we can't do it." I think it's the
24 other way around. I think if we don't achieve the
25 maximum technologically possible control on SME,

1 which they agreed to do, then we're hurting the
2 future development in Montana, and we don't want
3 to do that, I don't think. I don't want to do
4 that.

5 So what do you think about what I'm
6 saying?

7 MR. KLEMP: Mr. Chairman, Mr. Marble,
8 philosophically, I don't think you'll find too
9 many folks that would disagree with you. One of
10 the things we cannot do in the permitting process
11 is withhold available emissions for future
12 development. The permitting process is based upon
13 first come/first serve. We can't say, "There is
14 an ambient standard for sulphur dioxide." We
15 can't hold facilities to 50 percent of that. What
16 we hold them to is compliance with that ambient
17 standard.

18 The same would hold true for mercury. I
19 would agree with you it would be ideal if -- and
20 maybe that's what the Board chooses to do in this
21 rulemaking -- but from a permitting perspective,
22 and a BACT perspective, we need to look at what
23 the Best Available Control Technology is, not the
24 maximum achievable. That's a different standard
25 that applies in a different arena. And we can't

1 say, "SME, keep your emissions down, so that Great
2 Northern can come in."

3 CHAIRMAN RUSSELL: We're going to have
4 to take a break. So is this just a follow up on
5 this one? If it's a new question, we'll come
6 right back at it.

7 MS. SHROPSHIRE: It's sort of a -- I
8 guess DEQ has proposed .9. And has Great Falls
9 received their permit yet?

10 MR. KLEMP: Mr. Chairman, Ms.
11 Shropshire, Southern Montana Electric has received
12 a draft permit that's out for comment. We haven't
13 issued our final decision, no.

14 MS. SHROPSHIRE: I'm just thinking with
15 the DEQ's proposed rules at .9, is that in
16 conflict with the 1.5 then?

17 MR. MARBLE: That's for 2010.

18 MR. KLEMP: Mr. Chairman, Ms.
19 Shropshire, I don't believe it's in conflict. I
20 think as Chuck explained, when we establish a
21 permit limitation, it falls under these sets of
22 rules: Site specific, case specific; applying
23 environmental aspects, economic, and technical
24 limitations. That's our BACT. That's how we came
25 up with 1.5.

1 The .9 may be something that applies to
2 all facilities, and that would -- Southern Montana
3 Electric would have to comply with both.

4 CHAIRMAN RUSSELL: Let's take a break.

5 (Recess taken)

6 CHAIRMAN RUSSELL: We're going to go
7 ahead and get started. We have spent a lot of
8 time on mercury, and I think we're going to try to
9 wrap mercury up pretty fast. We still have folks
10 in the audience that might want to speak to it,
11 and the Department may want to give us a little
12 closure. But Tom, why don't we get going.

13 MR. LIVERS: Sure, Mr. Chairman.
14 Actually we've presented everything that we wanted
15 to lay out. Really as much as anything, we wanted
16 to give the Board an opportunity to ask questions,
17 and make sure the different pieces of this were
18 understood, and make sure also that we were
19 addressing and touching on all those areas that
20 the Board wants us to look at. So we're really
21 done with any kind of presentation. If there are
22 further questions, if there are any areas that we
23 didn't touch on that the Board wants to ask about
24 today, or wants us to consider and look at, we can
25 certainly do that, but that's what we've got.

1 MR. MARBLE: I have a comment. It's my
2 understanding that the Department is going to go
3 through all of the testimony and everything, and
4 respond to all of the comments and testimony, and
5 then provide that to us hopefully in the middle of
6 August or something like that?

7 MR. LIVERS: Mr. Chairman, Mr. Marble,
8 actually we'll be giving you the raw comments in
9 August, because the responses will essentially --
10 when we're preparing responses, we're doing so as
11 Board staff, so we'll need to support the decision
12 you make in the September meeting, so that will
13 come after the decision in terms of responses.

14 MR. MARBLE: One of the concerns I have
15 is after going through the hearings, and hearing
16 all the testimony about cap and trade, and how it
17 works, and studying what it's based on, I feel
18 it's a flawed concept. It's based on no hot
19 spots, which isn't true. It's based on the fact
20 that mercury isn't a hazardous substance, so we'll
21 handle it under Section 111, which I think is
22 clearly incorrect, in my opinion, from what I've
23 heard so far.

24 And I think it would be helpful, as you
25 go through the comments, that we keep that in

1 mind, that it's not a foregone conclusion, in my
2 mind anyway, that we are going to vote on a cap
3 and trade proposal, and to leave that open, so
4 that when we're considering various things -- what
5 happens if we just say, "We want a strict limit of
6 .9," and etc., and without the cap and trade?
7 Because as I understand, EPA doesn't really
8 require that you have to have cap and trade. It
9 says that if you don't, then there are certain
10 consequences. So anyway, I just wanted to throw
11 that out.

12 MR. LIVERS: Mr. Chairman, Mr. Marble,
13 that point is well taken, and that's actually one
14 of the reasons I had brought up the subject
15 earlier of maybe moving that September meeting
16 earlier in the month, so that after the Board has
17 made a decision, we'll then have time to respond
18 to that decision, and prepare the necessary
19 documents in support of it. We really don't want
20 to try to anticipate where this is going to go
21 until that discussion happens. And that would
22 give us more time to do that.

23 Maybe the only thing I would add is with
24 respect to the comments, I mentioned earlier our
25 time frame. We're also going to look at maybe

1 getting these out to you in kind of manageable
2 chunks, because that will probably work with your
3 schedules better, and we can get a portion of the
4 comments out earlier, rather than hold everything
5 until it goes at once. So we may not dribble them
6 out, but get them in three or four pieces, so that
7 you can start in on them.

8 CHAIRMAN RUSSELL: And just some process
9 things hopefully just to wrap this up. Remember,
10 their responses will have to mirror our rule, so
11 they're going to have to write possibly multiple
12 responses on each section. So when we get closer
13 to this, we will probably try to block this
14 rulemaking process out to where we're taking
15 discreet sections of it, and working through it as
16 we've done in the past.

17 So as we get these comments, I think
18 that it should be considered how we're going to
19 break out our process to address each of these
20 issues. And one specific: AEL's. What if we
21 establish an AEL that can't exceed 150 percent of
22 the standard in 2018? I just throw something like
23 that out. That may be something we'll have to
24 take action upon, and --

25 MS. WITTENBERG: Kim was disconnected.

1 CHAIRMAN RUSSELL: So basically I think
2 we need to keep this -- and the Department, you're
3 going to have to work on how we're going to
4 address each of these issues as we move through
5 it.

6 The other process thing is I just want
7 to make sure that we've noticed this wide enough
8 where --

9 (Ms. Lacey present again
10 by telephone)

11 MS. LACEY: Sorry about that.

12 CHAIRMAN RUSSELL: Thanks for coming
13 back, Kim. I guess getting a wide enough notice,
14 I hope that was done, because there is other
15 issues that -- We've all talked about BACT. How
16 does BACT relate to the standard? What if BACT
17 says you can do .6? Is that the new standard for
18 that plant?

19 These are some of the things that I
20 think, as the Department rolls through this, I
21 think it's going to be important to consider. So
22 hopefully that's all being addressed.

23 MR. LIVERS: Mr. Chairman, I guess I
24 heard two or three different points in there. One
25 of them is: You'll want us -- At the September

1 meeting, you'll want us to frame this so the Board
2 can kind of methodically work through the
3 different pieces of this rule; is that a piece of
4 what you're asking? And we can do that.

5 With respect to our response to
6 comments, given the number of permutations
7 possible in this, and the fact that we don't want
8 to presume which direction the Board is going to
9 go, we will be crafting those following the
10 September meeting. They will support the Board's
11 decision, and we're not going to try to anticipate
12 the range of options and combinations there. So I
13 just want to make sure that's understood.

14 And then your last point. Whatever rule
15 is adopted needs to be within the scope of the
16 rulemaking. And we fully agree with that, and I
17 think what we will -- Again, we purposefully tried
18 to initiate a very broad rule, knowing that we
19 were going to have a lot of discussion, and a lot
20 of determination of where we land on a variety of
21 issues. So the initiation was attempted to be as
22 broad as possible to give you broad side boards to
23 work within.

24 But as the Board deliberates in
25 September, I think it will be our responsibility,

1 as well as Ms. Orr's, to make sure that the
2 direction that we go and the actions you take lie
3 within the scope of the initiation.

4 CHAIRMAN RUSSELL: And that can be
5 framed as it's presented.

6 MR. LIVERS: Yes. I understand what
7 you're asking, and I think we can accommodate that
8 in how we choose to set up that framework for you
9 guys to work through it.

10 CHAIRMAN RUSSELL: Great, Tom. You've
11 done it before, and I know you can do it again.
12 Any other comments and questions before we move
13 on?

14 MS. KAISER: What about scheduling the
15 September meeting?

16 CHAIRMAN RUSSELL: We will talk about
17 scheduling this meeting, and Tom would like to
18 move it up basically for what he just mentioned --
19 the Department would like to move it up at least a
20 couple weeks, and I guess --

21 MR. LIVERS: We can talk about that now,
22 or we can talk about it at the end.

23 CHAIRMAN RUSSELL: Because the public
24 might want to respond to what we decide.

25 MR. LIVERS: You'll also want to give an

1 opportunity for public comment before the subject
2 is done.

3 Mr. Chairman, members of the Board,
4 again, we're slated for the last Friday in
5 September, which is September 29th. And let me
6 also clarify. I think I mentioned this earlier,
7 but just to make sure it's clear. We would like
8 to move up --

9 Let me ask first. I'm making the
10 assumption that the Board would prefer not to meet
11 twice in September, but rather move up the
12 September meeting, just so you can manage your own
13 time; is that a fair assumption?

14 CHAIRMAN RUSSELL: Yes.

15 MR. ROSSBACH: Yes.

16 MS. SHROPSHIRE: Yes.

17 MS. KAISER: Yes.

18 MR. SKUNKCAP: Yes.

19 MR. MARBLE: Yes.

20 MR. LIVERS: So what we would like to do
21 is to move up that meeting at least two weeks, so
22 probably no later than the 15th of September.
23 That's a Friday also. That would still require --
24 What would happen is the Board will meet, we'll
25 have the full agenda of all of our September

1 activities, including action on this rulemaking.

2 Then we will turn around and develop the
3 notice based on the action, and we will at some
4 point after that 15th meeting schedule a brief
5 teleconference, get that notice out to you so you
6 can formally have a notice to formally adopt, and
7 that will happen prior to the submittal deadline,
8 but two to three weeks after that meeting. So
9 that's kind of the process we're looking at.

10 So I think the only one we need to
11 necessarily lock in today is the meeting date.
12 And again, we would advocate that no later than
13 Friday the 15th, and maybe for the sake of getting
14 us going, is Friday the 15th an option?

15 CHAIRMAN RUSSELL: So will the 15th
16 work?

17 MR. ROSSBACH: I'll have to check.

18 MR. OPPER: I'm in D.C. the 13th, 14th,
19 and 15th.

20 MR. CHAFFEY: I'd mention that the
21 Climate Change Panel Meeting is in Kalispell on
22 Friday.

23 CHAIRMAN RUSSELL: Is it on Friday?

24 MR. CHAFFEY: It's scheduled for the
25 15th.

1 CHAIRMAN RUSSELL: So I guess the
2 Climate Change Meeting, is that going to be a big
3 conflict? No one even told me about it.

4 MS. LACEY: Do we have to have it on
5 Friday? Can we have it on a Wednesday or
6 something?

7 MR. LIVERS: I think, Mr. Chairman, Ms.
8 Lacey, we're not locked into Friday. To the
9 extent that Board members sometimes have Fridays
10 open on this, that that's an option, but we're
11 open. So we have the one conflict that's not a
12 fatal conflict; but maybe it's good to avoid, if
13 we could, the conflict with the Climate Change
14 Meeting.

15 The Western Environmental Trade
16 Association indicated their annual meeting is also
17 in the Flathead on the 13th and 14th, and there
18 are several folks involved in that. That's more
19 than just a single conflict, there would be
20 several entities involved in that that would be
21 also interested, so that's a consideration. I'm
22 not saying it needs to be scheduled around that.
23 But we also then, of course, have Monday or
24 Tuesday, the 11th and 12th, to think about.

25 CHAIRMAN RUSSELL: The only time I'm not

1 available is the 18th and 19th, and also the third
2 Thursday of that month, because I have a regular
3 board meeting. So we can schedule a different
4 date.

5 MR. SKUNKCAP: Mr. Chairman, I was going
6 to ask about Wednesday, too, but that sounds like
7 that is out. I'm not going to be able to make it.
8 The 21st or 22nd, if it has to be at the end of
9 the week, but earlier in the week would be fine.
10 If it's on the 15th, I cannot make it.

11 CHAIRMAN RUSSELL: The 8th is too early
12 for the staff, I'm guessing.

13 UNKNOWN SPEAKER: We can do the 8th.

14 MR. LIVERS: I may be out of town, but I
15 can try to rearrange that if I can. Mr. Chairman,
16 I think we try to avoid what conflicts we can, but
17 I think the Board schedule is what is going to
18 determine when we meet, the Board members.

19 MR. SKUNKCAP: The 8th is fine.

20 MS. KAISER: I need to check my
21 schedule. I don't have it in front of me.

22 CHAIRMAN RUSSELL: Let's tentatively
23 schedule for the 8th, and then Monday, it's going
24 to be very important that we roll on this and get
25 something out, and verify that, and then you'll

1 have to look at the website or something to see if
2 that's going to be the time. Or we have an
3 interested parties list or something.

4 MR. LIVERS: Yes. I'll make it back.
5 I'll arrange it.

6 MR. SKUNKCAP: Go ahead and schedule it.
7 That's fine. It's tentative for me, too.

8 MR. ROSSBACH: I think I have something
9 on the 15th.

10 MR. LIVERS: Mr. Chairman, I think what
11 needs to drive this is that all of the Board
12 members can be available. That's got to be the
13 most important consideration here. So I would
14 advocate that -- and I appreciate the offer, but I
15 think we really need to find a date that's going
16 to work for sure for the Board members, and that's
17 going to drive it.

18 MR. SKUNKCAP: The 15th, I can make that
19 work.

20 MR. MARBLE: Let's do the 15th.

21 CHAIRMAN RUSSELL: Let's tentatively
22 schedule the 15th. If that doesn't work, Monday
23 by noon we need to know that -- the staff would
24 need to know, and then we'll have to call and poll
25 or something. And then once we get a definitive

1 date, then we'll just post it or get something
2 emailed to interested parties or whatever. And
3 they can always check the website, right?

4 MR. LIVERS: Yes. I think the 15th is
5 the latest we could go and still get the benefit
6 of moving the meeting.

7 CHAIRMAN RUSSELL: The 15th it is unless
8 we start to have people drop off. Katherine, we
9 didn't even ask.

10 MS. ORR: All of those are fine. I can
11 reschedule if necessary.

12 MS. LACEY: Mr. Chairman, since I'll be
13 flying in and out that same day, could we have
14 that as early as possible, so I don't have to
15 leave for the plane and miss the vote?

16 CHAIRMAN RUSSELL: Yes. We'll schedule
17 it early in the day.

18 MS. LACEY: Thank you.

19 CHAIRMAN RUSSELL: Let's move on before
20 we move away from this briefing item.

21 MR. SKUNKCAP: Mr. Chairman, I have a
22 question on the -- I don't know if this is the
23 time, but can we have an update -- or will that be
24 at the end of the meeting -- on the conference
25 call that took place. I cut out on that and I

1 wasn't able to get back in.

2 MR. LIVERS: I can address that when we
3 introduce the next item.

4 CHAIRMAN RUSSELL: We'll just do that at
5 the next item.

6 MR. SKUNKCAP: Thank you.

7 MR. ROSSBACH: The 15th is good.

8 MS. SHROPSHIRE: Can I ask some
9 questions about process?

10 CHAIRMAN RUSSELL: That would be good.

11 MS. SHROPSHIRE: My understanding is
12 that we were going to give DEQ some idea of where
13 we were coming from in terms of helping them
14 respond to comments. So on the 15th, we are
15 taking action on a rule?

16 CHAIRMAN RUSSELL: Yes, components of a
17 rule, and it will be noticed to encompass our
18 decisions. We're backing into some of this.

19 MS. SHROPSHIRE: I guess just in terms
20 of that, I guess I just want to be clear that one
21 of the things that I'm interested in is we say .9,
22 or BACT, whichever one is stricter, or something
23 along those lines, or some lowest emission level
24 that's achievable. I'm curious how much room that
25 leaves open for new development, because I think

1 that's something that's important. And what
2 different options are you going to give us at that
3 meeting? Do you need some more guidance from us
4 based on the hearings, or things like how we're
5 feeling?

6 I guess here is where I stand. From
7 having a couple days of hearings, and hearing
8 experts present testimony at both of these
9 hearings, is that we can do better than .9, and
10 I'm interested in how much room for development
11 that leaves if we can do better than that. And
12 I'm not sure how that fits into this. Does that
13 make sense at all?

14 CHAIRMAN RUSSELL: Well, it does, and my
15 biggest concern here is that if it's not noticed
16 big enough to say that we set a standard, but BACT
17 rules the day, and sets a standard specific for
18 that plant, then did we go far enough? And that
19 was a question that I had, if we had noticed this
20 to the point where what rules? If there is an
21 emission that's lower based on BACT, that's
22 stricter, was the rule written broad enough to say
23 BACT rules the day, or does .9 rule the day?

24 MS. SHROPSHIRE: Because it sounds like
25 BACT is assumed anyway. BACT is part of the

1 process.

2 CHAIRMAN RUSSELL: Does BACT stop at .9?

3 MS. SHROPSHIRE: So in terms of giving
4 -- I don't know if this is premature. But we can
5 allow for more development, energy development in
6 Montana by having stricter emission limits, and we
7 don't want to limit energy development in Montana.
8 And so if BACT is stricter than .9, I don't want
9 it to be limited to .9, if that means we can have
10 more energy development. So that's one thing that
11 I just want to make clear.

12 The other thing is in terms of new
13 development, I've been reading about Roundup, and
14 the plant they're proposing; and if that comes out
15 of it, I don't know what their emission limits
16 would be, but that also leaves room for a lot more
17 new development if their emission limits are
18 better than what they were currently proposing.

19 So I think we should leave it open for
20 more energy development, but trading is a bad idea
21 for a bunch of reasons. There is local
22 deposition. To actually trade mercury, you have
23 to be able to measure it. The current technology
24 to measure mercury is poor. So there is a bunch
25 of reasons why trading is bad, and I think that

1 that has been pretty clear in the record.

2 CHAIRMAN RUSSELL: And just to maybe
3 close this, it would be very important that when
4 we frame this, that we don't say, "You're voting
5 on cap and trade." There may be we want to vote
6 on the cap, but we don't want to link that to the
7 trade. And maybe we would want to look at
8 trade -- are we going to allow intrastate, or
9 interstate, or are we going to allow none? Those
10 are the options I think that have to be framed out
11 for us when we make these decisions.

12 MS. SHROPSHIRE: For both new and
13 existing facilities.

14 MR. LIVERS: Okay. Mr. Chairman,
15 members of the Board, I think that's what we
16 envisioned. And as Mr. Homer had kind of laid out
17 the questions to be addressed, I think that was
18 kind of a glimpse of the type of subdivisions of
19 this issue that we would anticipate in terms of a
20 methodology for the Board to work through it,
21 because again, there is a lot of different
22 combinations that could come out of this, and I
23 think we're going to need to kind of help the
24 Board through methodically dealing with each of
25 those component pieces, and we will set up a

1 structure to do just that.

2 So there is a pretty long list, but I
3 think we've surfaced the kinds of things you want
4 on the table to consider individually or as you
5 work through this rule. Did that address your
6 question, Ms. Shropshire? You had a few different
7 points there.

8 MS. SHROPSHIRE: Do we need a motion to
9 guide you to do that?

10 MR. LIVERS: No.

11 CHAIRMAN RUSSELL: We can't. It's not
12 noticed that way.

13 MR. LIVERS: Initially this was going to
14 cover a couple things: The request of the Board
15 members to have a chance to talk about it, a
16 chance to just make sure there was another
17 opportunity to field questions, so that if folks
18 still had some pieces that they wanted to
19 understand better, we could address those. I
20 think we've done those two.

21 I think at one point we were thinking
22 that any direction we could get would help us
23 structure this rulemaking process, I think that's
24 what we're doing right now. But again, there are
25 two very important caveats: One is that whatever

1 comes out has to be within the scope of the
2 initial rulemaking; but the other is since you
3 don't have the entire record yet, there's nothing
4 binding that comes out of this meeting. It's just
5 a general sense of how we can get our arms around
6 this, and help frame it so that you guys can get
7 your arms around it, and that's really all we're
8 looking for here, and I think we've got that.

9 MS. SHROPSHIRE: And I think just along
10 those lines, lignite versus non-lignite, you'll
11 look at the comments on that in terms of what's
12 appropriate in terms of emissions for different
13 types of coal in order to protect public health
14 and the environment?

15 MR. LIVERS: Yes. And Mr. Chairman, the
16 other part, I guess, by buying ourselves this
17 extra time on the tail end, after you've made your
18 decision, that helps immensely, too. Now our real
19 challenge to come out of today is making sure we
20 know enough to set up how you're going to make
21 this decision that is really useful to you.

22 The other piece of this is after you've
23 made that decision, then we'll complete the
24 record, and we can't know what that is until it
25 happens, and you've had your chance to review and

1 act on the record. So that helps us a lot by
2 buying that extra time as well.

3 MS. SHROPSHIRE: In the proposed rule
4 that talked about different control technologies,
5 and I guess I just -- one of the things is mercury
6 specific control technology versus a boiler,
7 things like that. And so I guess I would like to
8 see it be specific in terms of mercury specific
9 control technologies, that it's clear --

10 One of the things that I've been hearing
11 and talking with different groups is that in terms
12 of getting financing for a new plant, it's very
13 important that the rule be clear. And so I want
14 it to be explicit, so that in order for companies
15 to get financing, that there is no ambiguity in
16 the rule. I think that's important, that they
17 know exactly what they have to meet.

18 MR. LIVERS: Mr. Chairman, Ms.
19 Shropshire, that's good direction, and we'll do
20 our best to structure the decision making process
21 in September to accomplish that; and then after
22 your decision is made, we'll then draft the actual
23 rule that you'll act on later in a telephone
24 conference, and at that point we'll be able to
25 take even further direction, and make sure that

1 the language is as explicit and clearly reflective
2 of the Board's decision as it needs to be.

3 CHAIRMAN RUSSELL: And you may want to
4 keep the 29th open for that, or whatever we need.

5 MR. LIVERS: That's possible. And Mr.
6 Chairman, I imagine our staff would like as much
7 time as possible between the 15th and the
8 submittal deadline, which is, what, the sixth?
9 Fourth?

10 MR. HOMER: 16th of October.

11 MR. LIVERS: So we may be actually
12 looking at the second weekend in October for that
13 telephone conference, somewhere in that general
14 time frame, and we can -- Well, it's the Board's
15 pleasure. If you want to look at that now, or if
16 you would like to talk about that in September.

17 MS. SHROPSHIRE: I had some specific
18 suggestions on making it clearer, and maybe now is
19 not the time to do that.

20 CHAIRMAN RUSSELL: I think the
21 Department has been directed to make it as broad
22 as possible, and parse it out as much as possible.
23 I heard existing plants; I heard new plants; I
24 heard just -- trying to get some direction here --
25 I heard different types of coal; and how these

1 affect new and existing plants; AEL's; standards.
2 We're getting all this, right?

3 MS. SHROPSHIRE: In terms of AEL's, I
4 think it talks about 15 months versus a year,
5 things like that. I think there is some timelines
6 in there in terms of reporting back on the success
7 of different methods. I think that can be
8 tightened up a little bit, and maybe you guys know
9 what I'm talking about. If somebody doesn't meet
10 the standard, and they're going to request an AEL,
11 the time frame in which they have to do that. I
12 think that can be clearer also.

13 MR. LIVERS: Mr. Chairman, and members
14 of the Board, I want to make sure I haven't
15 created any confusion about what documents are out
16 there and what's coming when. There won't be
17 another notice prior to action. We'll be working
18 with the notice as it was originally initiated.
19 We're trying to take the results of today's
20 meeting to frame your decision making process. As
21 we do that, as we frame it, and as you make your
22 decisions, we'll need to make sure that the
23 decisions lie within the scope of that initial
24 rulemaking. So we will have to keep that honest
25 in our September meeting.

1 MS. SHROPSHIRE: I'm not trying to
2 change that. Maybe making it clearer.

3 MR. LIVERS: Then I think what you're
4 looking at, then we have to distill that. After
5 your action in September, we have to distill that
6 into a complete document, including the final
7 rulemaking that you'll act on, the final
8 rulemaking order, the responses to comments. We
9 will do that based on what you decide, and then we
10 will take the next roughly three weeks to craft
11 that, finish that record, and craft it into a
12 specific order that you'll get to see ahead of
13 time, of course, and you'll get to see and then
14 act on in a telephone conference in early October.
15 So that's kind of the process from here.

16 CHAIRMAN RUSSELL: With the supporting
17 documents. All right, at this time, if there is
18 anyone that wants to comment on this specifically
19 -- this is not testimony time. This is a process
20 time. If you have an issue with how we've moved
21 forward, and certainly of anything that's been
22 discussed, that would be appropriate. If you get
23 outside of those bounds, then you're not in order.
24 So anyone who wants to speak to this?

25 (No response).

1 CHAIRMAN RUSSELL: Seeing no one jumping
2 up, let's move on to the next briefing item. The
3 next briefing item I think is metal mines.

4 MS. SHROPSHIRE: Oh, wait. Mr. Oppen
5 talked about the joint venture with Department of
6 Public Health in looking at mercury. I just think
7 that's great. I just wanted to say along those
8 lines if you can do more than just hair, but look
9 at maybe soil or things like that, I think that
10 that would be great information to have. So thank
11 you for that.

12 CHAIRMAN RUSSELL: We are now going to
13 move on to a very brief briefing item relating to
14 metal mines. Tom.

15 MR. LIVERS: Thank you, Mr. Chairman.
16 And I can also address Mr. Skunkcap's question in
17 this, kind of a recap of the decision at the last
18 meeting, the telephone meeting.

19 If you recall, the Board acted to table
20 the metal mine rule at the last meeting, and I
21 think that happened after your phone cut out, Mr.
22 Skunkcap. So that was the ultimate action. What
23 that effectively did was: In effect, that rule
24 did not move forward, and part of the Department's
25 position on the rulemaking was that many of the

1 changes would be more effective, and really needed
2 to be made in statute as opposed to in rule. And
3 I think we had committed --

4 We had indicated that our top
5 legislative priority going into this legislative
6 session is metal mine legislation. So we
7 committed to give a briefing on what we had in
8 mind for legislation, conceptually what we're
9 proposing, and under the status on that, as I
10 think the Board certainly had, as did we, the
11 Department, had interest in what the rule was
12 trying to accomplish, but we felt there were
13 better ways and more appropriate ways to
14 accomplish that, and that's what we're trying to
15 do now.

16 So with that, Director Oppen will
17 present a brief synopsis of that legislation
18 package.

19 MR. OPPEN: Mr. Chairman, members of the
20 Board, for the record, I'm still Richard Oppen,
21 Director of DEQ. Again, as Mr. Livers said, I
22 will talk very briefly about some of the
23 legislative initiatives that the Department is
24 planning to take to make sure we do a couple of
25 things.

1 Number one, we want to strengthen the
2 Department's ability to protect taxpayers from
3 some of the unanticipated problems that may arise
4 from hard rock mining. More importantly, we want
5 to improve the Department's ability to prevent
6 unanticipated problems from coming up in the first
7 place, on the theory that it's a lot easier and
8 cheaper to address pollution issues if you prevent
9 them in the first place. So we do not have a bill
10 drafted, but as we have discussed internally, this
11 is what we think the bill is going to include.

12 First of all, we want to introduce
13 legislation that would allow the DEQ to request
14 interim bonding during environmental analysis of
15 DEQ proposed permit changes in response to
16 environmental problems. Just for a quick example,
17 let's say a mine all of sudden has an issue with
18 thallium in some of its drainage water. So that's
19 not something that was anticipated. We've run
20 into this before in the past.

21 We want to be able -- we know it's going
22 to be expensive to address. We may find ourselves
23 with an inadequate bond in place. We have do a
24 lot of environment studies to address the source
25 of the thallium, what to do about the thallium,

1 come up with alternatives.

2 Right now we don't have the ability to
3 increase our bonding until the environmental
4 analyses are complete. We want the ability to
5 increase the bonding when we see a problem
6 initially, and that would minimize exposure to the
7 taxpayers for that period of time.

8 Another thing it would do, the
9 legislation we're hoping or planning to introduce
10 -- hoping, planning to -- it would provide DEQ
11 with the authority to address MEPA fees for
12 environmental analyses of DEQ proposed permit
13 changes in response to environmental problems.

14 Right now we can assess fees. We can
15 get reimbursed for the MEPA analysis we do. We
16 can't apply for reimbursement for those fees until
17 a company actually submits an application for a
18 permit, or an application for a permit
19 modification. What this means is that we can
20 conduct an EIS that is going to require a permit
21 change, a change in operations of the mine. We
22 can go through the entire EIS process, but we
23 can't really bill the companies for the costs that
24 we incur for that EIS until the company in
25 response to the EIS submits its permit

1 modification application to the Department. So we
2 could be out of pocket for a long time.

3 In fact, if our EIS shows that it's
4 going to require permit modification on the part
5 of the company, the company may decide, "We're
6 near the end of the mine life. We're not going to
7 go ahead with this," and we could be out-of-pocket
8 forever on that, and never recoup our expenses.

9 So that would minimize exposure to the
10 DEQ and the taxpayers for the cost of the
11 environmental analyses.

12 We also are going to request authority
13 to require additional bonds for water treatment.
14 That's a big issue. We want to make sure we have
15 adequate authority to require that.

16 We also want to provide the Department
17 with the authority to require that all data needed
18 to characterize a site's hydrology, geology,
19 geochemistry, we want to be able to require all
20 that in the application for the permit. We don't
21 want companies to be able to say no when we're
22 requesting data. We want to be sure that that's
23 clarified in the legislation, and we have the
24 ability to require all of the information that we
25 think we need in the permit.

1 Now, most of this has to do with the --
2 and I mentioned already -- most of it has to do
3 with minimizing exposure to taxpayers, some of the
4 financial instruments we're looking at. The other
5 thing that the legislation that we would propose
6 is going to do, again, this is to try to do a
7 better job of preventing problems in the first
8 place.

9 We want to put more stringent
10 requirements on mining and reclamation plans. We
11 want to do things like requiring source water
12 control. We want to be able to protect, to
13 isolate the water that's coming from the mine
14 drainage. We want to be able to protect that from
15 the environment if there is a major problem with
16 that, by controlling the source of that water, so
17 it doesn't become reactive material.

18 So for example, we want to be able to
19 require source control, for example. Another
20 thing we're looking at is the potential for
21 isolating reactive materials. If we have a
22 problem where we have a reactive material like
23 high deposits of pyrite, it produces sulphuric
24 acid when mixed with water and air. We want to be
25 able to isolate that, and maybe some of the less

1 reactive material in the overburden that won't
2 cause those kinds of problems. So that's really
3 kind of the last thing that we're looking at in
4 that piece of legislation at this point.

5 We've had a couple meetings with the
6 Montana Mining Association that we think were
7 productive. They're got some issues with some of
8 these, but I think we're on the same page. We're
9 going to be broadening those discussions. We
10 think it's important to include other interest
11 groups as this legislative initiative moves
12 forward.

13 We've already presented our legislative
14 package to the Environmental Quality Council. We
15 did this earlier this week. And this bill, just
16 so you know, of all the Department legislation
17 items that the Department is planning to advance
18 this year, this was our top priority. So we are
19 taking this very seriously. EQC agreed to work
20 with us to predraft this bill and other bills.
21 That is going to give us a little bit of a head
22 start at the legislative process.

23 The only other thing I want to mention
24 right now is that we have advanced this notion,
25 come out of the hearings, that we really need some

1 money for Swift Gulch. That problem in Swift
2 Gulch occurred later than some of the other
3 problems that we've seen. We were kind of behind
4 schedule in trying to address that. We've done
5 some things.

6 We're working with the Budget Office
7 right now to try to get some money to do some
8 short term necessary steps to try to protect water
9 quality in Swift Gulch. So we have worked with
10 the Budget Office, the Governor's Budget Office.
11 We believe they're going to support us in our
12 request for some funding in this next Legislature
13 for that.

14 That's it.

15 CHAIRMAN RUSSELL: Is there any
16 questions for Director Oppen?

17 MS. SHROPSHIRE: At the last, I guess it
18 was the telephone conference meeting, we talked
19 about sort of different levels, the legislation,
20 bonding, but then also maybe a trust fund or
21 something. Like for Zortman, for example, if the
22 funding runs out, where is their funding? Maybe
23 some trust fund to fix that. And I'm curious
24 where the funding stands for Zortman right now.

25 MR. OPPER: Mr. Chairman, Ms.

1 Shropshire, I'm not going to be able to give you a
2 lot of detail right now on exactly where the
3 funding stands. It's shakey, and it's a concern
4 of all of ours, and we have discussed with the
5 Mining Association the concept of a trust fund.

6 Now, a trust fund, the problem with it,
7 if you pay into it annually, it's thirty years
8 before it's fully capitalized, twenty years,
9 however you do it, you construct it; but it's a
10 long time before you can start drawing interest
11 off that.

12 There are some other options for begging
13 for money, but they may or may not be legislative
14 in nature. But it is a concern of ours, and the
15 money that we have in the remaining bond for
16 operating the water treatment system is going to
17 run out in a year, and it's a major concern for
18 all of us.

19 MS. SHROPSHIRE: Is that something that
20 could be incorporated in this, or would that be
21 separate?

22 MR. OPPER: There could be a budget
23 request specifically for continuing to operate the
24 water treatment facility at Zortman Landusky now.
25 Again, last session, what we did is that we are

1 planning to divert \$1.2 million annually into a
2 trust fund that would fully fund the water
3 treatment activities at Zortman Landusky, not for
4 Swift Gulch, but on the other side of the
5 mountain, and that's not fully capitalized until I
6 believe 2018, a year that seems to be living in
7 infamy.

8 MS. SHROPSHIRE: That's why I was just
9 concerned, if in between now and 2018 money runs
10 out.

11 MR. OPPER: We share your concern, and
12 it is a legitimate question as to whether or not
13 we should approach the Legislature for an
14 appropriation to keep us going in the interim. So
15 that's something the Department will consider.

16 MR. SKUNKCAP: Mr. Chairman, I have a
17 question for Mr. Oppen. Mr. Oppen, you talked
18 about the treatment of the other places, and a
19 particular place that wasn't getting treated. You
20 mentioned short term treatment right now in Swift
21 Gulch. Where does Swift Gulch go, or where is
22 Swift Gulch?

23 MR. MARBLE: It goes through Hays.

24 MR. LIVERS: I could answer the question
25 if you would like.

1 MR. OPPER: I didn't understand the
2 question. I'm sorry. Where does the water flow?

3 MR. SKUNKCAP: Where is Swift Gulch?
4 Where does it go?

5 MR. OPPER: You're not talking about
6 hydrologically, you're talking about the
7 Department's plan for addressing Swift gulch.

8 MR. SKUNKCAP: The other one goes to
9 Zortman.

10 MR. LIVERS: Mr. Chairman, Mr. Skunkcap,
11 that essentially flows primarily north onto the
12 reservation. I think the problem -- I wasn't
13 involved in the permitting of Zortman. But when
14 the reclamation plans and funds were originally
15 set up, the assumption was made that the impacts
16 would be in the same drainages where the mining
17 was occurring, and those are the Zortman and
18 Landusky drainages which flow southeast and south.

19 It was not anticipated that there would
20 be that ground water connection and that Swift
21 Gulch would be impacted because it was in a
22 different drainage. So that's why it was not part
23 of the original bonding and original reclamation
24 plan. We found out years later that there is an
25 impact, or at least a readily apparent impact, and

1 at that time, it was essentially too late with
2 Pegasus already bankrupt, and so we've been
3 scrambling ever since on Swift Gulch.

4 The Department has put in requests for
5 funding for Swift Gulch in the last several
6 legislative sessions, and we've not been
7 successful. We are a lot more optimistic because
8 of the supportive discussions we've had with the
9 Governor's Office and the Budget Offices, as Mr.
10 Oppen had said.

11 So we see a real need both to understand
12 exactly what that connection is, but also to get
13 some immediate fixes in place. If we're
14 successful in getting support during the
15 legislative session, we'll be able to construct
16 several permanent bermings. It's a tricky
17 situation in terms of treatment plants as tight as
18 that gulch is. So we're looking at just what
19 options might be available.

20 But I guess the reason Swift Gulch has
21 not been included in the original reclamation was
22 that it was not anticipated that there would be an
23 impact over there, and that surfaced later. So I
24 don't know if that answers your question, sir.

25 MR. SKUNKCAP: It does. Thank you, Mr.

1 Livers. That's why I would strongly recommend the
2 Board, and also the Governor, too, to do a site
3 visit on that Swift Gulch area. Thank you, Mr.
4 Livers, Mr. Chairman.

5 MR. OPPER: Mr. Skunkcap, if I could,
6 this is certainly a priority for Mr. Livers and I
7 to get out to the site as well, not just the Board
8 members. We certainly intend to get out to the
9 site to see what you've seen, and see what people
10 have to live with who are in that drainage.

11 MR. SKUNKCAP: Thank you very much.

12 MR. OPPER: Thanks for your work in
13 advocating for steps to be taken on this. Any
14 other questions for me?

15 (No response)

16 MR. OPPER: Thank you.

17 CHAIRMAN RUSSELL: Do you have any
18 questions, or do we want to go any further with
19 this?

20 MR. LIVERS: We need to open it up for
21 potential comments.

22 MS. SHROPSHIRE: One just brief comment,
23 and that's just that at the last meeting, I had
24 encouraged the Department, in drafting this, that
25 you work with all the groups, and just continue to

1 recommend that you involve all stakeholders in
2 that process.

3 CHAIRMAN RUSSELL: Is there anyone in
4 the audience that would like to speak to this
5 before we move on to our last briefing item?

6 MR. STEWART: Mr. Chairman, members of
7 the Board, my name is Dustin Stewart, representing
8 the Montana Mining Association. I'll be very
9 brief here today.

10 I just wanted to comment on the workings
11 that have happened since your last meeting, which
12 was a conference call around a month ago. We've
13 had a couple, I would say, three meetings with DEQ
14 and staff, and we have progressed a long way
15 amongst our membership towards sorting out the
16 facts, finding out exactly what these concepts and
17 proposals would do, and going a long way down the
18 road towards throwing our support behind --
19 perhaps all, at least the majority of the
20 concepts.

21 We're still doing fact finding on some
22 of it. That's why I can't give any information at
23 this point. But we are prepared to and we will
24 continue doing this going forward through a
25 legislative session, working with the Director,

1 and the Department, and all parties they feel need
2 to be involved. And our goal is to make sure that
3 the DEQ has the ability to do their job, and
4 that's what we're looking for.

5 A lot of the discussions have been
6 focused around whether or not they already had the
7 authority, because a lot of our members felt that
8 they had the authority under current law to do
9 some of the things that they're requesting; and
10 we're finding out, through looking at language,
11 that that may not be the case, and some language
12 needs to be shored up.

13 That's where we're at right now, and
14 certainly available to answer any questions,
15 either now or in your free time.

16 CHAIRMAN RUSSELL: Thanks, Dustin.
17 Anyone else?

18 (No response).

19 MR. LIVERS: Mr. Chairman, this might be
20 a good time, too, to just kind of take a little
21 further discussion on potential visits to Zortman
22 Landusky. I guess maybe the first question is --
23 we do have the invitation out there. I think it
24 was pretty clear during the phone meeting last
25 month that Board members were interested in

1 getting to see the site, and the first question
2 is: Is this something the Board wants to do as an
3 entire board -- in which case it would be a public
4 meeting, and noticed, and subject to certain
5 things -- or would you rather break into smaller
6 groups? And we can facilitate --

7 You're certainly welcome to visit
8 individually on your own schedule, but we would be
9 more than happy to facilitate some visits to the
10 site. I think there might be some efficiency in
11 getting three people together, and taking a van up
12 there, and that sort of thing. I know for at
13 least Kim, if not Don, it might be easier to
14 travel there directly, rather than coming this
15 way. But we're open to that, and if you would
16 like, we can certainly try to schedule some things
17 yet this summer.

18 MS. SHROPSHIRE: I think that having us
19 go as a Board, even though that may logistically
20 be more difficult, it's nice for us to all be
21 there at the same time, and be seeing the same
22 things, and hearing same discussions at the same
23 time. I don't know if that's a logistical
24 nightmare. I think my preference would be that we
25 go together.

1 CHAIRMAN RUSSELL: Well, I would agree
2 with that, but I just think with summer the way
3 it's rolling, it's going to be very difficult.

4 MS. LACEY: Joe, may I add something,
5 please? It is very dry up here. There are
6 several large fires occurring, and I know that the
7 drought has extended towards that area. So we
8 also need to be cautious that it's the time of the
9 year where there is not a potential of starting
10 fires, and that sort of thing, because it's not
11 good.

12 CHAIRMAN RUSSELL: Thanks, Kim.

13 MR. MARBLE: I'd prefer we do it on our
14 own or in small groups.

15 MR. ROSSBACH: Likewise.

16 CHAIRMAN RUSSELL: One of the things
17 that may be appropriate is to get an email out and
18 poll. I think, Don and Kim, catching you
19 somewhere closer than Helena would be important.
20 Kim would be coming from the other way. But I
21 think the consistency comes with making sure it's
22 properly noticed -- and I'm not talking about
23 Board notice -- that we're going to be there. And
24 I think that I heard Tom commit Richard and
25 himself to being there with -- if we have like

1 three and three go -- that they would be at both.
2 Didn't I hear that?

3 MR. OPPER: No.

4 CHAIRMAN RUSSELL: I heard it from Tom.

5 MR. LIVERS: I may. I don't have a
6 problem with that. We would also have our site
7 manager Wayne Jefferson there as well if there are
8 other staff that needed to be there. It's been a
9 couple of years since I've been to the site,
10 so --

11 CHAIRMAN RUSSELL: I just think that we
12 can generate some consistency from that, and
13 summer is just about gone, and fall is going to
14 happen fast. And so I agree that it would be nice
15 to notice it, and have the whole Board there, but
16 I'm not sure that we can do that.

17 MS. SHROPSHIRE: I know that we
18 committed to doing this in the summer, at least
19 most of us did, but I don't know if early fall
20 would be pushing it too much.

21 MR. LIVERS: Mr. Chairman, Ms.
22 Shropshire, it makes it riskier obviously.
23 September is already busy for the Board. But it's
24 not inconceivable that we can get in there in
25 October. It would just depend. But it would be

1 risky.

2 CHAIRMAN RUSSELL: Maybe the last two
3 weeks of August should be looked at for a small
4 group. I may be able to go in August. And Robin,
5 don't you have some educational commitments that
6 happen?

7 MS. SHROPSHIRE: Starting in August.

8 CHAIRMAN RUSSELL: The last two weeks of
9 August?

10 MS. SHROPSHIRE: (Nods head).

11 MR. LIVERS: Mr. Chairman, if I might
12 suggest, I also see the value of being there as an
13 entire Board. I think logistically at this stage
14 of the game, that's really difficult to coordinate
15 all of your schedules, and get you all there at
16 once. Plus there are public notice issues, and
17 frankly there are budgetary issues as well. I
18 don't think that necessarily precludes another
19 visit sometime in the future as an entire Board,
20 if we want to look at that in a year's time, or if
21 it's timely.

22 But in the meantime, to enable more of
23 the Board members to get there, and to get on site
24 and see things first hand, I think it's going to
25 be a lot more workable to do it in small groups.

1 I might suggest that we just proceed with that in
2 mind, contacting you individually. We'll be
3 emailing your general availability and
4 preferences, and see if we can arrange a time when
5 maybe we can take a van out of Helena with three
6 Board members, something like that, and do that a
7 couple of times, if that would be acceptable.

8 CHAIRMAN RUSSELL: Gayle, I asked this
9 question earlier, and we got sidetracked. But do
10 you want to go back? If you do, then it's
11 actually three trips.

12 MR. SKUNKCAP: I would go back. I would
13 adjust my schedule for that. I strongly think we
14 as the Board and Department should be there
15 together, and if we can get the Governor to go
16 along. But I could readjust my schedule, as I did
17 this last visit. I had other commitments, too.
18 But I think this is a really important issue that
19 needs to be addressed right away, and I would
20 adjust my schedule whatever. But once again, I
21 would like to strongly urge the Department and the
22 Board to be there all at once.

23 CHAIRMAN RUSSELL: Well, I think we'll
24 keep all this in mind as we try and figure out
25 some dates, and --

1 MR. LIVERS: Mr. Chairman, we'll do what
2 we can to arrange this, and it may not be possible
3 for each Board member to get there on this notice.
4 I understand that. But we will try to arrange it
5 so that it just facilitates as many Board members
6 getting on site as early as possible.

7 CHAIRMAN RUSSELL: Thanks, Tom. Let's
8 move on to the last briefing item, and I don't
9 know what we were going to talk about.

10 MR. MARBLE: I think there is a lot of
11 litigation ongoing regarding coal bed methane. Is
12 that something -- Can somebody tell us about that?

13 CHAIRMAN RUSSELL: I think the
14 Department is planning on briefing us on where
15 they are in the permitting, and also maybe you can
16 give us a shot at how many people are suing
17 Montana for their decision.

18 MR. LIVERS: Mr. Chairman, members of
19 the Board, the briefing that was prepared -- and
20 we can certainly give a quick update on the legal
21 lawsuits as well -- but the briefing the Board had
22 requested has to do with one of the components of
23 the CBM rulemaking from last spring.

24 You may recall that one component that
25 was technology based effluent limits, and the

1 Department expressed some concerns during that
2 adoption, during the rulemaking, of regarding just
3 the level of analysis necessary to produce a
4 defensible effluent guideline for coal bed
5 methane.

6 So the Board directed not to adopt those
7 effluent guideline limits when it adopted the
8 rule, but it directed the Department to work with
9 particularly industry and stakeholders to come up
10 with some numeric limits, and ideally come up with
11 them by September -- maybe that was part of the
12 direction -- come up with those limits by
13 September. And I think the assumption there was
14 that if we could find limits that were being met
15 already, then by definition, they would be
16 technically and economically feasible because they
17 were already in the place.

18 So based on that direction, we did
19 convene a group in Billings last spring. It had
20 all producers, I think, in Montana, and most from
21 Wyoming; Wyoming DEQ was there, EMIT Technologies
22 was there; the Northern Cheyenne Tribe was
23 represented; as was Northern Plains Resource
24 Council.

25 It was primarily a discussion with

1 industry at that time to get information on what
2 was being done out there, what technologies are in
3 place, and try to get a sense of what limits are
4 now being met, so that we could use that as a
5 basis for starting development of the guidelines,
6 the effluent limits.

7 I was not at that meeting. Art Compton
8 was our point person. He was unfortunately not
9 able to be here today. He is out of town. But he
10 gave me a summary of the meeting, and the general
11 sense was that it really wasn't the right vehicle
12 for exchanging potentially proprietary information
13 necessary to get at the actual limits. So we did
14 some additional surveying after that, and were
15 able to get some responses back in.

16 We got limited information. So we
17 continue to have some concerns as the Department.
18 We're continuing to work toward the limits the
19 Board has directed us to set, but we continue to
20 have some concerns as a Department on the level of
21 analysis necessary for really producing a
22 standard, and also extrapolating from limited
23 information into guidelines that are essentially
24 going to be applicable industry-wide and
25 state-wide. We feel that's a leap.

1 I don't want to just leave it at that in
2 terms of all of the problems with going this
3 direction, because we also have some ideas on
4 different ways to accomplish the same thing, and
5 we think maybe better and maybe quicker. And I
6 will talk about, just briefly talk about some of
7 the other factual and some proposed legislation
8 we've got dealing with our permitting process, and
9 the ability to apply best professional judgment in
10 that process.

11 But I guess before I get into that, I
12 would like to turn it over to a couple of other
13 Department staff just to talk a little bit about
14 what has to go into a legally defensible limit,
15 and then also just a quick technical discussion on
16 how these limits fit in with the other standards
17 and the nondeg policy, if the Board wants that
18 level of detail. I guess that's a question I've
19 got. I don't want to take too much time. If you
20 would wish that we wrap this up quickly, I can
21 just touch on the other ideas we've got, too. So
22 whatever the Board's pleasure is there.

23 CHAIRMAN RUSSELL: Bill, what's your
24 pleasure?

25 MR. ROSSBACH: You know what my pleasure

1 is. Quicker.

2 MS. KAISER: Second.

3 MR. MARBLE: Could that report be put in
4 writing and submitted to the Board members?

5 MR. LIVERS: We certainly could.

6 MR. MARBLE: I think that might be
7 more --

8 MS. SHROPSHIRE: So standards were set
9 by the previous Board, correct?

10 MR. LIVERS: Correct.

11 MS. SHROPSHIRE: In setting those
12 standards, was treatment thought of?

13 CHAIRMAN RUSSELL: What do you mean?

14 MR. LIVERS: Mr. Chairman --

15 MS. SHROPSHIRE: Not the nondeg, but for
16 EC and SAR specifically. You guys came up with
17 numeric standards. Because there were numeric
18 standards, and then it was said that EC and SAR
19 were non-harmful, and then we didn't change the
20 standards this second go around, we just said EC
21 and SAR are harmful, and then imposing nondeg. So
22 I'm curious if those standards that were set
23 previously, if treatment was considered as part of
24 setting those standards. I know that's a big
25 question, and it's not a short answer.

1 MR. LIVERS: Mr. Chairman, Ms.
2 Shropshire, I'll try to give a real condensed
3 answer, and if we need more detail, I'll kick in
4 with staff.

5 But basically the standards that were
6 set three years ago, the numeric standards for EC
7 and SAR are water quality based standards as
8 opposed to technology based standards. So they
9 essentially are a measure of the concentration of
10 those parameters in the stream, in the discharge
11 waters, as opposed to a technology based standard
12 which would essentially mandate getting it down to
13 a particular limit at end of pipe.

14 I don't recall to the extent a
15 technology based approach was considered three
16 years ago. I think most of the discussion
17 centered around a water quality based standard.

18 CHAIRMAN RUSSELL: It was all water
19 quality based, and the capacity of that water body
20 to deal with what was being put into it. And I
21 can assure you that during that process, we spent
22 as much time deliberating on setting those
23 standards, if not more than the current Board did
24 on the three items that we dealt with before. And
25 I think the record will be pretty clear about the

1 fact that the standards were set in a very public
2 and very logical approach.

3 MS. SHROPSHIRE: Are those standards
4 what we're being sued over now?

5 CHAIRMAN RUSSELL: The one in Montana is
6 basically a lawsuit about those standards, and how
7 they were set.

8 MR. LIVERS: Mr. Chairman, members of
9 the Board, I'm not trying to condense this so much
10 that we're not really providing the information
11 you want. I'm just respectful of the fact that
12 this has been a long meeting, and pretty intense.
13 So we can certainly follow up in writing if that's
14 the way to go, or if you want to us to go into
15 more detail now, we certainly are prepared to do
16 that.

17 CHAIRMAN RUSSELL: You throw in the
18 issue about technology based. That's not what the
19 rulemaking was about.

20 MS. SHROPSHIRE: No, and I guess what
21 you were referring to -- I'm just trying to
22 clarify that what you're talking about now is what
23 the treatment standards are allowed to be.

24 MR. LIVERS: Well, Mr. Chairman, Ms.
25 Shropshire, one of the components of the petition

1 that made its way into the original initiated rule
2 had to do with technology based limits, effluent
3 limits, and I guess that's why the issue was on
4 the table. It was looked at during the rulemaking
5 process; we expressed our concerns; the Board
6 directed us to pursue an alternate approach; and
7 this was kind of an update on what's been
8 happening with that, and that's why the briefing
9 is here and that's why the question or the issue
10 of effluent limits is on the table. Did that
11 help?

12 MS. SHROPSHIRE: It just seems like
13 we're making it more complicated than we have to
14 sometimes. At the same time, how you set air
15 emission limits and how you set water quality
16 limits aren't the same. I don't know. I know
17 people are in a hurry to leave.

18 MR. LIVERS: The other thing we could
19 do --

20 MS. SHROPSHIRE: I think it's important.

21 MR. LIVERS: Mr. Chairman, Ms.
22 Shropshire, we do, too, and I'm not trying to
23 dismiss it by condensing our discussion here. We
24 actually had two staff members on board to talk
25 about kind of the legal aspects of setting these

1 guidelines, and also the technical; and we can do
2 that now, we can put it together, or we'd be also
3 happy to meet one-on-one.

4 MS. SHROPSHIRE: The other thing is I
5 know that people have traveled here for this
6 meeting for this particular topic, so if we are
7 not going to -- in respect for them, I think we
8 should take it seriously, and just at least listen
9 to what -- Maybe we can condense it to 30 seconds,
10 but at least hear a brief briefing as quickly as
11 possible. I think that's only fair.

12 CHAIRMAN RUSSELL: That's fine. I know
13 that Kendall has some concerns that he wants to
14 bring to the Board anyway, so whether he came here
15 for that or to hear what the Department is doing
16 right now, we'll find out.

17 MR. LIVERS: Mr. Chairman, with that
18 direction, as quickly as possible, we'll kind of
19 blast through a couple things. Claudia Massman
20 will present a quick presentation on what it takes
21 to have a legally defensible effluent limit; we'll
22 have a couple more people, one more person after
23 Claudia, and then I'll talk.

24 MS. MASSMAN: Mr. Chairman, members of
25 the Board, my name is Claudia Massman, attorney

1 for DEQ. And I have been asked to give kind of an
2 overview of the legal requirements for adopting
3 ELG, effluent limitation guidelines.

4 And of course, you know the source of
5 the Board's authority stems from the Montana Water
6 Quality Act, and that statute sets up a two step
7 process. The Board is required to adopt any
8 ELG promulgated by EPA, and the Board has done
9 this and incorporated those federally promulgated
10 ELG's into our permit rules.

11 The second step is the one that concerns
12 us today, because that is: If the EPA hasn't
13 promulgated an ELG for a particular industry, then
14 the Board has the discretion to do that. But the
15 legal requirement is that the Board can only adopt
16 an ELG after ensuring that it's technicologically,
17 economically, and environmentally feasible.

18 So the question from a legal standpoint,
19 for example, if this rule was later challenged in
20 court, is how much of a demonstration would the
21 Board have to have, how much evidence would they
22 have to in terms of feasibility. The Courts
23 review an agency decision such as this under
24 standard of reasonableness.

25 So for example, if the Board went ahead

1 and adopted an ELG without any factual
2 demonstration of feasibility, the Court would
3 likely rule that it was invalid, and that the
4 Board had acted arbitrarily and capriciously,
5 didn't follow the law, or didn't ensure the ELG
6 was feasible.

7 So again, the question is: How much
8 evidence is enough? Is it simply a limitation in
9 a permit? Is it what? Something that industry
10 hands over to us?

11 This question is coming up because the
12 states, unlike EPA, do not adopt ELG's. And you
13 have to look at the Clean Water Act where Congress
14 assigned the states and the federal government two
15 separate roles. States are responsible for
16 adopting water quality standards to protect the
17 beneficial use of the streams within their
18 borders; and EPA was assigned the task of coming
19 up with federal technology-based standards that
20 were applicable industry wide. They would set
21 kind of a uniform standard that would create a
22 level playing field.

23 So again, if the Board's rule were to be
24 challenged in a court of law, I think a state
25 court would look at EPA as the model of what

1 should be done to demonstrate technological
2 feasibility and economic feasibility, because
3 again, under the Clean Water Act, EPA has to
4 consider the feasibility of an ELG nationwide
5 before it adopts it.

6 So briefly, I'll just summarize. If you
7 look at what EPA did to adopt an ELG for fish
8 farms, for example, they promulgated a proposed
9 ELG in the year 2002, but in the preamble of the
10 proposed rule, they described three separate
11 documents that they had prepared ahead of their
12 proposed rules:

13 One was an economic and environmental
14 impact analysis; another one was a development
15 document, where it had EPA's technical decisions
16 on how it came to its decision to promulgate this
17 ELG; and the last one was a guidance document that
18 contained best management practices for the fish
19 farm industry, because one of the ELG's that EPA
20 promulgated was the requirement that fish farms
21 use best management practices rather than
22 treatment for certain things.

23 Then the way EPA collects all this data
24 is they send out a survey, kind of like the
25 Department did, but EPA sends a draft survey to a

1 technical advisory committee, as well as industry,
2 and asks for comments, and revises their survey to
3 make sure they're asking the right questions, so
4 they'll have the right information to establish
5 these technology-based requirements.

6 EPA collects data not only from
7 industry, but private and governmental entities;
8 and then when it collects all that data, it puts
9 the data out for public comment; and then at the
10 end of that process, again, it will come up with a
11 proposal, as it did in 2002. But the whole time
12 frame takes somewhere between three to eight
13 years.

14 And again, I'm saying nothing more than
15 if an ELG promulgate by the Board were taken to
16 Court, I'm assuming that since EPA seems to be the
17 only one developing ELG's -- we're not aware of
18 any other state who has done this -- I think a
19 Court would look to the way EPA does it, and not
20 that Montana would have to have its broad scope
21 and limit it to statewide or basin wide ELG.
22 Again, you would have to have some sort of
23 specific demonstration of why the ELG is feasible,
24 and I believe EPA would used a standard of
25 reasonableness.

1 MS. SHROPSHIRE: I can't even remember
2 which meeting it was, but I think the Board
3 directed DEQ to work with the stakeholders on
4 developing some effluent guidelines; is that
5 correct?

6 MR. LIVERS: Mr. Chairman, Ms.
7 Shropshire, I think it was the March meeting when
8 the coal bed methane rule was adopted, the
9 direction was given to work with stakeholders, and
10 primarily industry, to come with up what -- to
11 basically look at what's out there now, and use
12 that as the basis for assuming technical and
13 economic feasibility, and come back with a limit,
14 a proposed limit.

15 MS. SHROPSHIRE: So is that different
16 than an ELG?

17 MR. LIVERS: No, that's what we're
18 talking about now. The effluent limit guideline
19 is what we're talking about. And we had concerns
20 about the rigor of the analysis to make this
21 defensible, and how realistic it was.

22 MS. SHROPSHIRE: To set an effluent
23 guideline?

24 MR. LIVERS: Yes.

25 MS. SHROPSHIRE: At any level.

1 MR. LIVERS: Any meaningful level.

2 MS. SHROPSHIRE: So you're saying that
3 you can't do that?

4 MR. LIVERS: Mr. Chairman, Ms.
5 Shropshire, what I think might be most productive
6 is we might want to hear from Bob Bukantis next on
7 how these fit in vis-a-vis the standards, and
8 nondeg; and then I would like to talk just briefly
9 about some of our proposed legislation. That will
10 maybe give a better overall package and context to
11 this. And you may still clearly have some
12 questions, but I think it might be easier to get
13 arms around the issue, and deal with that, if we
14 could.

15 MS. SHROPSHIRE: I guess because from
16 the testimony before, I think there was testimony
17 to show that it was technologically feasible and
18 economically feasible, so I thought that already
19 in record there was evidence to show that. So
20 that's why I'm confused as to why it's not
21 possible now.

22 MR. LIVERS: Mr. Chairman, Ms.
23 Shropshire, I think there was some disagreement
24 frankly, and I think at least a couple Board
25 members stated on the record that they felt that

1 the analysis that already had been presented in
2 the record was adequate. We have some concerns
3 with that, and stated those at the time, and I
4 guess continue to have those concerns. But
5 nonetheless, we are still pushing forward. We do
6 have some alternatives. And I guess that we would
7 like to kind of run through the complete package
8 first.

9 With that, Bob Bukantis will talk a
10 little bit about how these fit in with the overall
11 tools of standards and nondeg as well.

12 MR. BUKANTIS: Mr. Chairman, members of
13 the Board, good afternoon. I admire your tenacity
14 today. For the record, my name is Bob Bukantis,
15 and I manage the Water Quality Standards Program
16 for DEQ. And I'm going to try to keep this brief,
17 but actually what I organized very much gets at
18 many of your questions. So basically I'm going to
19 try to outline the regulatory context for effluent
20 limitation guidelines, and just talk real briefly
21 about the relationship between water quality
22 standards, Montana's nondegradation policy, and
23 permitting.

24 Just to start off real briefly, just to
25 be clear on what we have authority to regulate and

1 not regulate in coal bed methane development is
2 all that we have authority for is to issue permits
3 for discharges to surface waters. And so if
4 someone wants to develop coal bed methane,
5 produces water, and for example wants to atomize
6 it to the atmosphere, discharge it into
7 off-channel ponds, use it up in an irrigation
8 system, or stock water, or whatever, we don't get
9 involved in that.

10 Where we do get involved is if that
11 water is direct discharged to state waters, and
12 then we're responsible for issuing the discharge
13 permit.

14 To talk a little bit about the permits
15 in full context, we basically have two different
16 approaches that we use to come up with permits.
17 One is a technology based approach, and other is
18 the water quality based approach.

19 In the technology based approach, kind
20 of where we grab the number or whatever of choice
21 to come up with the permit limit is ideally from
22 an effluent limit guideline. And as Claudia
23 spoke, they are typically promulgated by EPA for
24 an industry.

25 An effluent limit guideline is basically

1 regulations typically developed and published by
2 EPA to establish national guidelines for an
3 industry.

4 We did a little bit of homework before
5 this. We sent out a query to the Association of
6 State and Interstate Water Pollution Control
7 Administrators, and asked if any other states had
8 experience with effluent limit guidelines, and got
9 a handful of responses, and they were all
10 negative.

11 I spoke with one of EPA's permit
12 managers, manager of the Region 8 program, and she
13 did not know of any. So typically, it's done by
14 EPA on a federal basis again.

15 An important point is that the effluent
16 limit guideline is used to support discharge
17 permits only. There is an option -- that I won't
18 get into in any detail at all right now -- to use
19 a best professional judgment approach, called BPJ,
20 in the absence of an ELG or for a site specific
21 situation, but that's done on a permit by permit
22 basis. It's something that takes significant
23 analysis, and it's something the Department feels
24 we do not have authority for. I think Tom is
25 going to touch on a little bit more in his wrap

1 up. That's how ELG's fit in.

2 Now, the water quality based approach is
3 the standards based approach, and this gets back
4 to the 2003 rulemaking. Basically the alternative
5 way to set permit limits to a technology based
6 approach is based on water quality standards. And
7 in the case of a technology based approach, you're
8 strictly looking at the technology and economics
9 of treatment in terms of setting a number. In the
10 water quality based approach, we're looking at the
11 effect on the receiving water and the protection
12 of beneficial uses.

13 So recall when you have a water quality
14 standard, the standard is really made up of three
15 components: It's beneficial use that you're going
16 to protect; it's the criteria that you use to
17 determine that you're protecting that use; and
18 it's the nondegradation policy that you use as a
19 policy on how you allocate assimilative capacity,
20 that is, protect that increment of high quality
21 water that's cleaner than the standard.

22 So those are the main pieces of a
23 standard, and those are the pieces that then go
24 into writing a water quality based permit.

25 Now, a few things to consider about

1 this. Again, the role of ELG is strictly to set a
2 technology based permit. The Board has adopted
3 very protective water quality standards, I think
4 probably appropriately protective water quality
5 standards, and including the recent designation of
6 EC and SAR as harmful, which basically allows for
7 more stringent protection of assimilative
8 capacity, basically trying to maintain high
9 quality water where it does exist, is the intent
10 of the nondegradation piece.

11 Both of those numbers are taken into
12 account in setting a water quality based permit,
13 that is, both the standard and the nondegradation
14 thresholds. And something to think about is if,
15 for example, a coal bed methane producer wanted to
16 grab some assimilative capacity out of the Powder
17 River Basin, at this point, given the
18 concentrations of the salts in the river right now
19 in that system, to get a permit under the current
20 rules, they almost certainly need to get an
21 authorization to degrade, especially if they're
22 going to use some of that assimilative capacity.

23 MS. SHROPSHIRE: There is no
24 assimilative capacity.

25 MR. BUKANTIS: Yes. Anyplace where

1 there is assimilative capacity -- because
2 sometimes the water, especially in the Tongue, is
3 cleaner than the standard, because it's above the
4 nondegradation threshold -- if there is
5 assimilative capacity, and they wanted to use
6 that, they would have to go through the
7 authorization to degrade process.

8 And if you recall, during the testimony
9 for the last rulemaking, industry got up here and
10 said that they see this as a prohibitive process.
11 It's a pretty stringent process, and requires
12 pretty in-depth analysis.

13 But some of the presumptions are the
14 existing uses need to be maintained and protected
15 in order to get an authorization to degrade, and
16 DEQ can only issue an authorization to degrade if
17 the preponderance of the evidence shows that
18 degradation is necessary because there is no
19 economically, environmentally, and technologically
20 feasible modifications to the proposed project
21 that would result in no degradation; and the
22 proposed project will result in important economic
23 or social development; and that the benefits of
24 that development exceeds the costs of the
25 degradation to society; and that the Department

1 would have to ensure that the least degrading
2 water quality protection practices that are
3 economically, environmentally, and technically
4 feasible will be implemented prior to the project
5 starting, and be maintained during the project.

6 So it's a pretty stringent thing. We
7 don't give that assimilative capacity away easy
8 using that nondeg threshold. So basically we have
9 that tool there in place now.

10 MS. SHROPSHIRE: To degrade the water?

11 MR. BUKANTIS: I think to protect the
12 water quality.

13 MS. SHROPSHIRE: I mean if we wanted to
14 degrade the water, we have to jump through a bunch
15 of hoops?

16 MR. BUKANTIS: Yes, pretty in-depth
17 analysis. And actually since that piece of
18 statute and associated rules were put in place, no
19 one has come to the Department for an
20 authorization to degrade under the current rules.

21 So I think I'll stop there for this, and
22 hopefully that helps.

23 CHAIRMAN RUSSELL: Thanks, Bob. Any
24 questions for Bob?

25 MR. LIVERS: I guess maybe just pulling

1 things together, and then Claudia, Bob, and I will
2 all be available for whatever questions there are,
3 just to put a little context on this.

4 We're continuing to work toward the
5 limit as we were directed by the Board. As I
6 stated, we still have our concerns about
7 defensibility, and just the idea of extrapolating
8 industry statewide from the limited information.

9 EPA is considering whether it's going to
10 develop and promulgate effluent limit guidelines
11 for coal bed methane discharge water. We may know
12 -- there is supposedly a decision point in August.
13 There is no guarantee we'll know more in August if
14 they're going to do it or not, so I don't want to
15 raise that expectation. If they do choose to go
16 forward, we're talking about a multi-year process,
17 just so folks are aware of that. But if those
18 were to be in place, I believe they would
19 supersede state standards. Is that correct?

20 MR. NORTH: The Board would be required
21 to adopt them.

22 MR. LIVERS: The Board would be required
23 to adopt the EPA ELG's, but that's a few years
24 out, but that is a possibility.

25 The legislation we've mentioned deals

1 with, as Bob indicated, the best professional
2 judgment. We do not currently have the authority
3 to use that in permitting decisions, and we're
4 proposing legislation that would allow that.
5 Essentially that gives us the ability to do this
6 same thing, the same kind of analysis, but on a
7 site specific case-by-case basis, which is still
8 pretty rigorous and intensive, but it's a
9 different order of magnitude than trying to do
10 that on a statewide and industry wide basis.

11 So essentially as a permit, new permit,
12 new discharge, additional discharge renewal comes
13 in, if we're successful with this legislation, we
14 would have the ability to do best professional
15 judgment, which allows us to incorporate our
16 knowledge of various approaches, technologies out
17 there, their technical, economically,
18 environmental feasibility. So essentially the
19 same kind of stuff that will go in an ELG
20 analysis, and it's somewhat analogous to a BACT
21 process.

22 CHAIRMAN RUSSELL: Apparently best
23 professional judgment is not a rulemaking issue
24 with the Board?

25 MR. LIVERS: Mr. Chairman, currently our

1 determination is we don't have statutory
2 authority, or in fact maybe prevented essentially
3 from that. So the Board would not be able at this
4 point to do rulemaking on that approach.

5 CHAIRMAN RUSSELL: So you could still
6 come to the Board to write some rules or --

7 MR. LIVERS: We could very likely come
8 to the Board for rulemaking. I'm not sure it's
9 within the Board's purview, and it would depend on
10 what that legislative action looks like.

11 CHAIRMAN RUSSELL: You could make it
12 part of the Board's purview?

13 MR. LIVERS: We could.

14 CHAIRMAN RUSSELL: But you could make it
15 not part of the Board's purview by how you write
16 the legislation?

17 MR. LIVERS: Yes. On advice of Counsel,
18 that's correct.

19 CHAIRMAN RUSSELL: But you couldn't
20 exceed the existing numeric limit that is in place
21 right now? You can just use that as a tool?

22 MR. LIVERS: I would agree with that,
23 yes.

24 CHAIRMAN RUSSELL: You can't take away
25 what the Board did?

1 MR. LIVERS: Mr. Chairman, no, we can't.
2 This would be an additional tool, and we could not
3 allow a discharge that violated the standards that
4 the Board has set in place. That's correct.

5 CHAIRMAN RUSSELL: I'm going to make a
6 wacky comment. Why are we doing all this when
7 everyone is suing us because our standards are so
8 strict? Why are we wasting our time? It seems
9 nonsensical to me that we're spending so much time
10 with this when the standard must be so darn strict
11 that people are suing Montana for that.

12 MR. LIVERS: Mr. Chairman, one comment
13 on that that's related. I think it's our general
14 opinion, it's my opinion that there is a
15 misconception that this somehow casts a wider or
16 tighter net over the other tools that the Board
17 has now put in place, and essentially we don't
18 agree with that. And maybe others have different
19 opinions on that that they would like to express,
20 but --

21 CHAIRMAN RUSSELL: I have a concern that
22 ELG's are going to actually strip away the work
23 that the Board has done to this point, and I think
24 there is a potential that that's why they're doing
25 them.

1 MR. ROSSBACH: Could we hear from
2 Kendall?

3 CHAIRMAN RUSSELL: Bill, that would be
4 fine. Do you have anything else before we open it
5 up?

6 MS. SHROPSHIRE: Is it true that no
7 state has ever set an ELG?

8 MR. LIVERS: Mr. Chairman, Ms.
9 Shropshire, we did attempt to poll -- we sent out
10 a general request nationwide through a couple of
11 associations, and we only heard back from a
12 handful of states, but we're not aware of
13 anything, and those responses we got back were
14 negative.

15 MS. SHROPSHIRE: Wyoming, for example.

16 MR. LIVERS: So we don't like to
17 extrapolate nationwide with a small data set, but
18 we're not aware of anything that any other state
19 has done.

20 CHAIRMAN RUSSELL: We can certainly
21 double back towards the Department. Kendall, do
22 you want to --

23 MR. SCHNEIDER: Mr. Chairman, members of
24 the Board, Tom Schneider testifying as an
25 individual on behalf of Northern Plains today, and

1 I am merely a substitute for the people on the
2 ground that would normally be here. What they're
3 doing is fighting fires, and trying to save their
4 land, and salvage some crops in this drought.
5 Otherwise they'd be here.

6 What I've heard today strikes me as
7 shocking, and the Board, with only one dissent,
8 made it abundantly clear in March that it expected
9 the Department to pursue establishment of effluent
10 based guidelines by a stakeholder process,
11 including and not primarily directed by industry.
12 So I don't know where the word "primarily" came.
13 It certainly wasn't from the Board. And I've got
14 that transcript here.

15 The discussion by Mr. Rossbach, who made
16 the motion, and by the Chair, and by Ms.
17 Shropshire, made it very clear what your
18 expectations were, and what your direction to this
19 Department was, and to the parties, industry as
20 well as the stakeholders, that they were supposed
21 to convene and to come back with a required flow
22 based effluent guidelines for your action in
23 September. It could not have been more direct
24 direction.

25 What has ensued since that direction

1 from this Board is that there was a half day
2 meeting convened by the Department, at which
3 Northern Plains, one of the stakeholders and the
4 petitioner, original petitioner, was relegated to
5 observer status, and the participants from the
6 industry side either stonewalled or hid behind a
7 protected information status, proprietary
8 information status.

9 So the process that you directed, and
10 outlined, and described that you wanted, has been
11 a dismal failure, both in terms of the process --
12 which is minimal at best -- as well as the
13 substance.

14 What has also ensued is litigation. The
15 industry track is lawsuits in both Wyoming and
16 Montana, litigating your 2003 rule, Mr. Chairman,
17 as well as the nondeg that you also adopted in
18 March. So it's pretty clear what the industry
19 tack and position is on this matter, and here
20 today you've been presented with a Department view
21 that we can't get there from there. It's kind of
22 -- throw your hands up.

23 And that really strikes me as strange
24 given the very clear direction from this Board in
25 March. It's clear that the industry has no

1 interest whatsoever in pursuing your flow based
2 effluent directive, and that the Department is not
3 going to pursue that either. What they are
4 pursuing is a very different track than from what
5 you directed, and that's a legislative strategy.

6 It is clear that there is -- Ms. Massman
7 talked about a record, an evidentiary basis. This
8 Board had a substantial evidentiary basis for
9 acting before, and your decision was, "We're not
10 quite ready to go there. We want you guys to get
11 together, and give us something that we can act
12 on," and that hasn't happened. So it strikes me
13 as being --

14 Basically they're thumbing their nose at
15 the Board of Environmental Review. And I don't
16 understand that, I hope you don't understand it
17 either, and that you will direct the Department to
18 prepare a draft rule consistent with the revised
19 compromised proposal that's submitted by Northern
20 Plains on the three constituent elements.

21 There certainly is a substantial basis
22 for a proposed rule based on the extensive record
23 and the compromised position coming out of that
24 record, to then notice that, and get on with the
25 action that may bring industry to the table, that

1 is, a specific proposed rule that you in fact
2 directed.

3 So I would sure urge you to go in that
4 direction, rather than having things turned
5 against you. Thank you, Mr. Chairman.

6 CHAIRMAN RUSSELL: Thanks, Tom. Any
7 questions for Tom?

8 MS. SHROPSHIRE: No, I don't have any
9 question. I was just going to comment on if in
10 fact Northern Plains did have observer status, I
11 find that offensive, if they weren't allowed to
12 participate in that process. And I would like to
13 see the minutes of that meeting to understand
14 better.

15 Because I do remember that we had very
16 clear guidelines about what was supposed to
17 happen, and if it was a meeting of industry
18 deciding that they couldn't do something, I don't
19 want to say that's not fair, but I don't think
20 that's the process that was intended. So I would
21 like to see the minutes of that meeting to
22 understand better what occurred because that
23 troubles me.

24 MR. LIVERS: Mr. Chairman, Ms.
25 Shropshire, I can't answer your question directly.

1 I wasn't there. I don't know if we have minutes
2 or not, but I can certainly look, and if they're
3 available, or whatever notes are available, I can
4 make available to the Board.

5 MS. SHROPSHIRE: It seems like at the
6 time the Board said, "We would like you guys to
7 come up with an ELG," and if that wasn't possible
8 at the time, I'm sure that Mr. North would have
9 made us aware of that. And so to come back
10 several months later and say, "Oh, well, we can't
11 do that," I guess that process is confusing me to
12 also. And even if ELG's haven't been done by
13 states before, it sounds like it's still within
14 the purview of the state to do that, even though
15 it hasn't been done before.

16 MR. LIVERS: Mr. Chairman, Ms.
17 Shropshire, on the issue of trying make our
18 position known on the concerns we had, I thought
19 we tried to do that pretty explicitly at the time
20 to indicate our real concerns with our ability to
21 do this. We're not trying to blow off the Board's
22 direction. There is some argument as to how
23 effective we've been in carrying it out. But what
24 we really did was try to not -- I think we pretty
25 explicitly laid out the same concerns, maybe not

1 in quite as much detail, but the same concerns
2 that were raised today I think were raised in
3 March, and throughout this process.

4 So the Board disagreed, and we've tried
5 to go from there. It doesn't mean, in our
6 opinion, the facts are any different than they
7 were then, and that's part of what we see as the
8 difficulty. I would personally agree with you
9 that just because no other state, at least to our
10 knowledge, has set the precedent, that doesn't
11 mean it can't be done, and that's not what we're
12 saying. It simply means that as we then look to
13 how they're done, the only precedent out there is
14 EPA, and that's what we're using as a model to try
15 to structure our effort. I guess I'm done.

16 CHAIRMAN RUSSELL: Tom, do you want to
17 add to that?

18 MR. SCHNEIDER: I just want to say, Mr.
19 Chairman, and the Board, the comment that was
20 brought up here -- which is new to the Board and
21 certainly wasn't discussed at the hearing in March
22 -- was, "Well, what we really want to do now is to
23 go to the Legislature, and get a best professional
24 judgment kind of authorization." And I'm thinking
25 the best professional judgment right now in the

1 Department is: "We can't get from here to there."
2 So what in the world is gained by that? It's
3 beyond me.

4 MR. LIVERS: Mr. Chairman, if I may add.
5 I don't mean to start trading barbs, but I think
6 it does need to be addressed. We intended this
7 independent of the direction of the Board,
8 although it's certainly consistent with it. We're
9 going to go forward with proposing this
10 legislation anyway. We think it's the right way
11 to go.

12 As I tried to make clear in my opening,
13 there is a huge difference between doing this on a
14 site specific basis than extrapolating state and
15 industry wide. They're simply different orders of
16 magnitude, and they come up with similar outcomes
17 applied on a case-by-case basis, but they're
18 different orders of magnitude.

19 MS. SHROPSHIRE: And I know that to put
20 things into practice is different than thinking
21 about them, but I just get tired of always having
22 excuses for why we can't protect the environment.

23 CHAIRMAN RUSSELL: I'm going to be
24 offended by that, because we have standards. It's
25 not like we don't have something protective of the

1 environment. I think a comment like that is
2 unwarranted.

3 MS. SHROPSHIRE: I apologize then.

4 CHAIRMAN RUSSELL: We're getting sued
5 because they think our standards are too strict
6 for them to deal with. I'm defending both the
7 Board's actions, setting numeric standards and
8 also setting a nondeg limit, calling them harmful.
9 Both of the previous Boards, of this Board and the
10 previous Board, have done some good work here, and
11 I'm not taking back anything that I did by saying
12 that we should move forward looking at this. But
13 don't say that they're not protective.

14 MS. SHROPSHIRE: I guess what I'm saying
15 is that -- I'm trying to argue that I know that
16 it's -- Sometimes you hear the argument we should
17 be doing more, and I know that it's not that
18 simple. But I also feel like we hear the argument
19 a lot that it's -- There are excuses for why we
20 can't do more, and sometimes those are
21 unwarranted, and that's all I'm saying.

22 CHAIRMAN RUSSELL: And I tend to believe
23 not achievable when you're a regulator. Being a
24 regulator, I can somewhat take the side of the
25 Department at times.

1 I do take exception to possibly
2 legislation that wouldn't become enabling for us
3 to make rule on, and I just make that statement,
4 because I think that if you do get some
5 legislation that allows for best professional
6 judgment, that we should be able to adopt it as a
7 rule as part of this package.

8 MS. SHROPSHIRE: Let me just clarify
9 that I'm not saying that we're not protecting the
10 environment, but I do think that we can treat
11 water at levels better than industry would say
12 they can.

13 CHAIRMAN RUSSELL: I could also state
14 that we could be reinjecting all this, too.
15 Kendall.

16 MR. VANDYKE: Mr. Chairman, members of
17 the Board, for the record, my name is Kendall
18 VanDyke. I work for the Northern Plains Resource
19 Council, and reside in Billings. I just have one
20 brief comment regarding Ms. Shropshire's comment
21 and the response by Chairman Russell about the
22 standards.

23 I would be happy to give every member of
24 this Board documentation that shows the exceedence
25 of those standards at Miles City, and it would be

1 interesting to know if the DEQ is aware of what
2 the water quality standard -- what the water
3 quality is at right now at Miles City, and if so,
4 what is being done to enforce those standards.
5 Thank you.

6 CHAIRMAN RUSSELL: Irrespective of any
7 permits that are being issued.

8 MR. VANDYKE: Right.

9 MR. ANDES: Mr. Chairman, members of the
10 Board, you've had a long day obviously, and I
11 appreciate your patience. I'll be brief. My name
12 is Roy Andes. I'm from Helena. By the way, I
13 want to add my personal appreciation for the
14 public service you all do on this Board, and if
15 the people of Montana don't thank you enough, they
16 should. So thank you from me in any case.

17 I am here to briefly outline for you
18 what we believe is an emerging technology that
19 will literally blow the roof off of coal bed
20 methane production in Montana and Wyoming. So I
21 want to provide a little quick history, then I
22 want to introduce Vivian Drake, who will equally
23 briefly tell you a little about the technology.

24 DW Technologies, LLC is a company which
25 has been newly formed in Montana, it's a Montana

1 based company. The principals are Ron and Vivian
2 Drake, lifelong residents of Helena, Montana. Ron
3 and Vivian are both scientists, and starting about
4 six years ago, Ron began the first vision, that
5 then began the development of a process to
6 essentially treat coal bed methane waters to a
7 standard, which our present target is an SAR of
8 three, and electrical conductivity of 1,000, with
9 a pH of greater than 6.5.

10 This process works at target at 8,500
11 barrels per day, making it economically efficient.
12 We think in the long term, it's going to be more
13 economically efficient than any of the current
14 modalities for disposing of water, including
15 reinjection, and including the treated irrigation
16 formulas that are currently being used as well
17 others.

18 But I think a little history is in
19 order. While the Drakes had their nose to the
20 grind stone working on this technology, and
21 developing it, testing it now several times, a
22 number of times in the field in Wyoming at a
23 Marathon Oil Company test site, and Marathon was a
24 very active sponsor in this process at that time,
25 and in fact, got their finger deep enough into

1 Drake engineering pie that they essentially had
2 some degree of control over the disposition of
3 this technology, which I won't go into any detail.

4 But the bottom line is Marathon has
5 their finger deeply into the Drakes and into this
6 process, that when we completed our last field
7 trial in, I think it was fall, they asked us for a
8 proposal for a final field trial, and that's where
9 we are now. We're ready for a final full scale
10 field trial of this technology. The field unit is
11 down in a shed by -- or in our plant down by the
12 airport here ready to go into the field within a
13 couple weeks. They asked us for a final proposal
14 on that, and haven't returned our phone calls.

15 Several other producers over the last
16 couple years -- more than several -- have rung our
17 phone off the hook asking us about this technology
18 -- how can they participate, how can they
19 contribute money -- and we've gotten back to them.
20 And most recently, Pinnaco inquired in detail and
21 offered up to \$500,000 for a final field trial of
22 this technology, and then stopped returning our
23 phone calls.

24 Now, these sounded like a lot of
25 coincidence to me, until I realize that the timing

1 of those non-returned phone calls was
2 approximately mid-March. They quit talking to us.
3 They quit being interested in this technology.
4 Marathon isn't interested in letting us continue
5 at one of their sites. We assume so by the total
6 silence they have given.

7 So if the producers are telling you they
8 can't do it, and they're suing you telling you
9 they can't do it, it's because they're not
10 following through on their original commitments to
11 us, to say, "We're interested in this technology.
12 We want to see it developed." They've developed
13 it far enough that they have -- they have assisted
14 in developing it far enough that they have some
15 fingers in our pie, but they're not willing to see
16 it go to the final step apparently. I don't know.
17 They're not talking to us.

18 So we just want you to know we're out
19 there, we're working on it. Let me just briefly
20 introduce Vivian, who can tell you a little bit
21 more about the technology, I think, without
22 violating any trade secrets. But Vivian, do you
23 want to say a few words.

24 MS. DRAKE: Mr. Chairman, members of the
25 Board, I didn't really come here today to talk at

1 all. Thank you, Roy. My name is Vivian Drake.
2 I'm co-owner of both Drake Engineering,
3 Incorporated, and a member of DW Technologies,
4 LLC, which is a new company that's been formed to
5 manufacture these units.

6 We have worked -- The reason you
7 probably have not heard from us before, and why I
8 have not been in front of this Board, is that
9 Marathon Oil Company asked us not to talk with DEQ
10 or this Board quite some time ago, and we have
11 respected their wishes up until the time they
12 stopped talking to us. We find ourselves at this
13 point in time with the unit ready to go back to
14 the final test in the field, without a test site.
15 So this is extremely frustrating for us, because
16 we really do believe this is going to be a boon to
17 the state, which is why we developed the process
18 in the first place.

19 We are an environmental technology
20 company. We've been in Montana since 1987. We're
21 native Montanans. We really think this is going
22 to change the face of the economy of the state;
23 but more importantly, it's going to clean the
24 water to the level that it needs to be to
25 discharge.

1 We specifically with our unit targeted
2 the lowest standards, or I should say the highest
3 standards, that this Board put together, and we
4 can achieve those, and we have achieved those in
5 the field.

6 So I'm not going to go into the
7 technology. It's a very novel technology. It's a
8 continuous ion exchange. It has three patents
9 pending with another one on the way. And it
10 produces a brine that is a salable product when
11 dried. There is no other waste that we generate,
12 just clean water.

13 So we're excited about it. We have sent
14 letters. I believe -- I hope the Board received
15 letters. We would like to invite you down to our
16 shop here in town to look at the unit opened up,
17 and we would be delighted to -- we'll even host
18 lunch.

19 But with that, I'll quit. You folks are
20 tired. I understand. I've been sitting here
21 listening to a lot of different issues. But
22 anytime you have any questions, please feel free
23 to call us.

24 The industry -- Marathon has been great
25 supporting us up to about two and a half months

1 ago, and then nothing now. And we just found
2 about this litigation last week, which was a bit
3 of a shock to us. So thank you for your time.

4 CHAIRMAN RUSSELL: Thanks, Vivian. Does
5 anyone else want to speak to the Board?

6 MR. MARBLE: Could we have her submit
7 some information to --

8 CHAIRMAN RUSSELL: It sounded like they
9 got some to the Department that didn't get to us.
10 Did you submit some stuff through the Department
11 for us?

12 MS. DRAKE: To the Director's Office.

13 CHAIRMAN RUSSELL: I haven't received
14 anything. I don't know if anyone else has.

15 MS. WITTENBERG: I've got it.

16 CHAIRMAN RUSSELL: We'll see it, and
17 then maybe we can do a quick field trip down to
18 the shop at some point.

19 MR. LIVERS: In groups of three or less.

20 CHAIRMAN RUSSELL: We'll stop on this
21 briefing item unless you want to beat this horse.

22 MR. LIVERS: This will be less than a
23 minute. I just want to thank the Board members
24 for hanging in there, and I guess I would like to
25 thank Ms. Shropshire for making sure we didn't

1 treat this issue too superficially. I don't think
2 I realized or -- My attempt to condense the
3 presentation was simply in the interests of time,
4 and where the Board was. It was obvious that
5 there were people who wanted to speak on this, so
6 I'm glad that we went into detail on it. It's
7 good public process. So I appreciate that. Thank
8 you.

9 CHAIRMAN RUSSELL: Thanks, Robin. This
10 is the time of the meeting when we're open for
11 general comments, anything that would be part of
12 the Board's purview. Does anyone want to speak to
13 any issues?

14 (No response).

15 CHAIRMAN RUSSELL: Seeing none, motion
16 to adjourn.

17 MR. SKUNKCAP: Motion.

18 CHAIRMAN RUSSELL: Second.

19 MR. ROSSBACH: Second.

20 CHAIRMAN RUSSELL: We're adjourned.

21 (The proceedings were concluded
22 at 2:43 p.m.)

23 * * * * *

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C E R T I F I C A T E

STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing -209- pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this day of , 2006.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2008.